FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals is reported at 558 F. 2d 1347 and appears in the first volume of the appendix (A. I) at pages 28–41. The opinion of the district court is reported at 403 F. Supp. 874, and appears at A. I, 42–96. The opinion of the State Water Resources Control Board appears at A. II, 6–40.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1977 (A. I, 9). A timely petition for rehearing was filed April 15, 1977 (A. I, 9–10).

The petition was denied August 12, 1977 (A. I, 10). A petition for certiorari was filed on August 19, 1977, and granted on December 5, 1977. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 8 of the Reclamation Act of 1902 authorizes a State to regulate the operations and uses of a federal reclamation project by placing conditions on the permits it issues to the federal government authorizing the appropriation of water for the project, where sufficient unappropriated water is available.

2. Whether the conditions imposed on the New Melones Project by Decision 1422 of the California Water Resources Control Board are consistent with the federal reclamation laws and with the purposes of the New Melones Project.

3. Whether the United States is estopped from challenging the conditions imposed in Decision 1422.

STATUTES INVOLVED

Section 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. 383, and the pertinent provisions of the Flood Control Act of 1944, 58 Stat. 888, 33 U.S.C. 701–1, and the Flood Control Act of 1962, 76 Stat. 1191, are set forth *infra* in Appendix B.

STATEMENT

A. THE NEW MELONES PROJECT

The Reclamation Act of 1902, 32 Stat. 388, as amended, 43 U.S.C. 371 *et seq.*, established a program

for federal construction and operation of reclamation projects to irrigate arid western land. One of the largest of the resulting projects is the Central Valley Project in California.[1] The Central Valley Project was originally authorized by the State of California in the Central Valley Project Act of 1933, Cal. Stats., Ch. 1042. Finding itself unable to finance a project of such magnitude, the State sought to have the federal government take over the project. Congress authorized federal funding of the project under the Act of August 30, 1935 (49 Stat. 1028, 1038), the Act of June 22, 1936 (49 Stat. 1597), and the Act of August 26, 1937 (50 Stat. 844, 850), which provides:

> * * * That the entire Central Valley project, California * * * is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes.[2]

Over the years Congress has authorized additional units of the Central Valley Project. One such unit is

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[1] See *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 279–284, for a description of the Central Valley Project.

[2] The project was subsequently reauthorized under the Act of October 17, 1940, 54 Stat. 1198.

the New Melones Project. The New Melones Project was originally authorized, as one of a number of "works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes," by the Flood Control Act of 1944, 58 Stat. 887, 891, 901. That Act authorized eight million dollars for the "initiation and partial accomplishment" of the New Melones Project (*id.* at 901). The Act also contained general provisions requiring consultation with the States. Section 1 of the Act required the Chief of the Army Corps of Engineers to submit the plans, proposals, and reports for new projects "to each affected State," and further required that the responses of the States be submitted to Congress. 58 Stat. 888–889. The Act additionally provided, in Section 1(c), that the Secretary of the Interior was similarly required to submit his plans, proposals, and reports on proposed projects to the affected States, and that "[i]n the event a submission of views and recommendations, made by an affected State * * *, sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress * * *." 58 Stat. 889.

The New Melones Project was modified and reauthorized by the Flood Control Act of 1962, 76 Stat. 1180, 1191. Before this congressional consideration, the project report of the Chief of Engineers was submitted to California, pursuant to the provisions of the 1944 Act requiring consultation with the affected

States. California responded, on April 20, 1962, with a letter and an attached report endorsing the project substantially as proposed by the Corps of Engineers.[3] The project report by the Corps of Engineers was submitted to Congress in June 1962, along with the comments of California, the Department of the Interior, and other interested parties; the entire package was printed as H.R. Doc. No. 453 (New Melones Project, Stanislaus River, California), 87th Cong. 2d Sess. (1962) (hereafter "Project Document"). In enacting the Flood Control Act of 1962, Congress ap-

[3] The letter, addressed to the Chief of Engineers and signed by William E. Warne, Director of California's Department of Water Resources, stated:

"It is concluded in the State's report that the New Melones Project is economically justified and would provide optimum multipurpose development of the waters of the lower Stanislaus River. Furthermore, it is recommended that the Congress authorize the New Melones Project for construction and operation by federal agencies subject to certain provisions specified in the State's report.

"I concur in the conclusions and recommendations contained in the State's report and request that this report be considered as expressing the official views and recommendations of the State of California with respect to the proposed New Melones Project."

The letter is reprinted in an Appendix to this brief; it appears at pages xi–xii of H.R. Doc. No. 453 (New Melones Project, Stanislaus River, California), 87th Cong., 2d Sess. (1962). The attached report appears *id.* at xiii–xxxiii; it is reprinted in Appendix A, *infra*. The "certain provisions" referred to in Mr. Warne's letter as qualifications to the State's endorsement of the project are presumably the minor ones mentioned in the report's "Conclusions" and "Recommendations," pp. 25A–27A, *infra*. They are discussed at pp. 112 n. 80, *infra*. The Department of the Interior also endorsed the project report, by a letter to the Chief of Engineers dated April 25, 1962, which appears at pp. xxxvi–xxxvii of H.R. Doc. No. 453, *supra*.

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proved this report as the standard for the reauthorized project. 76 Stat. 1180, 1191.[4]

The reauthorized New Melones Project provides for a dam on the Stanislaus River (a tributary of the San Joaquin) approximately 35 miles northeast of Modesto, California. The dam will create a reservoir with a gross storage capacity of about 2.4 million acre-feet, extending about 13 miles behind the dam. A hydro-electric power plant with a generating capacity of 300,000 kilowatts is being constructed immediately below the dam.[5] The purposes of the project include flood control, irrigation, municipal, industrial and domestic water consumption, production of hydroelectric power, recreation, water quality control, and preservation and propagation of fish and wildlife. 76 Stat. 1191–1192; A. II, 48.

According to information provided by the Bureau of Reclamation, more than $220 million has been expended to date on the New Melones Project. Construction of the project continues and is well advanced. The dam is more than 80 per cent completed, and it is anticipated that with favorable hydrological conditions water storage can be initiated in late 1978 or early 1979. The power plant is more than 70 per cent completed.

B. THE STATE PROCEEDINGS

In 1960 the Bureau of Reclamation of the Department of the Interior, on behalf of the United States, applied to the State Water Rights Board of California for permits to appropriate unappropriated water from the Stanislaus River for the purposes of the New Melones Project (A. II, 59, 63).[6] In addition, in 1967 the Bureau petitioned the State Water Rights

[4] The Act provides:

"Section 203. The following works of improvement for the benefit of navigation and the control of destructive floodwaters and other purposes are hereby adopted and authorized to be prosecuted under the direction of the Secretary of the Army and the supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein: *Provided*, That the necessary plans, specifications, and preliminary work may be prosecuted on any project authorized in this title with funds from appropriations hereafter made for flood control so as to be ready for rapid inauguration of a construction program: *Provided further*, That the projects authorized herein shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements: * * *." [76 Stat. 1180.]

* * * * *

"The New Melones project, Stanislaus River, California, * * * is hereby modified substantially in accordance with the recommendations of the Chief of Engineers in House Document Numbered 453, Eighty-seventh Congress, at an estimated cost of $113,717,000: * * *." [76 Stat. 1191.]

[5] The Project Document (H.R. Doc. No. 453, *supra*, at 32) specified that although a power plant was not included in the authorization, it was intended that a power plant would be constructed concurrently with the remainder of the New Melones Project immediately below the New Melones dam. The tentative capacity of the plant was 150,000 kilowatts, but the optimal size was to be selected after more detailed studies in conjunction with the Federal Power Commission (*ibid.*). On May 9, 1969, the Chairman of the Federal Power Commission wrote the Secretary of the Army recommending a capacity of 300,000 kilowatts, and this recommendation was approved by the Corps of Engineers and the Bureau of Reclamation.

[6] Application No. 19303 claimed 6,000 c.f.s. (cubic feet per second) for diversion to be directly applied to use for "power pur-

Board for assignment of permit applications that had been filed in 1952 by the California Department of Finance (A. II, 69, 41, 51).[7]

Protests opposing the Bureau's applications were filed by numerous individuals, companies, public agencies (such as the State Department of Fish and Game), and private groups (such as the Sierra Club and the Environmental Defense Fund) (A. I, 50). The protests were based mainly on environmental concerns or asserted conflicts between the Bureau's proposed diversions and prior users (*ibid.*).

On April 4, 1973, after lengthy hearings at which the Bureau and those who opposed its applications presented evidence and arguments, the California State Water Resources Control Board issued Decision 1422 (A. II, 6–40). The Board concluded that there was sufficient unappropriated water available in the Stanislaus River to satisfy the Bureau's requests (*id.* at 16). The Bureau had taken the position that the

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poses," and 2,400,000 acre-feet per annum for diversion to be stored and later applied to use for "power purposes" (A. II, 59). Application No. 19304 claimed 2250 c.f.s. to be directly applied, and 2,400,000 acre-feet per annum to be stored and later applied, to use for the purposes of "irrigation, preservation and propagation of fish and wildlife, and incidental domestic, recreational and water quality control" (A. II, 63; emphasis omitted). Both applications were filed March 11, 1960.

[7] Application No. 14858 claimed 8,800 c.f.s. to be applied directly to beneficial use, and 980,000 acre-feet per annum to be stored and later applied to beneficial use, for "irrigation, domestic, municipal, industrial, fish, culture, recreation, and water quality control purposes" (A. II, 41). No. 14859 was identical to 14558 except that it claimed the water for power purposes (A. II, 51).

Board's function was limited to determining whether there was sufficient unappropriated water available, and that the Board had no jurisdiction to impose any conditions on permits issued to the United States for a federal reclamation project (see A. II, 76–100). The Board rejected this position, reaffirming its earlier decisions holding that the Bureau was subject to state law when it applied for a permit to appropriate water (A. II, 30–31). The Board concluded that under state law it was required to examine the Bureau's applications to determine whether the water would be put to beneficial use, and that:

> In addition, the specific intended use must be evaluated and found to be reasonable, beneficial and *in the public interest* before a permit can issue. The Board undertakes a balancing of competing demands and policy considerations and has broad discretion. [*Id.* at 21; emphasis in original; citations omitted.]

The Board expressed concern that the Bureau had presented "no specific plan for applying project water to beneficial use for consumptive purposes at any particular location" (*id.* at 19–20). The Board stated that the "limited unappropriated water resource of the State should not be committed to an applicant in the absence of a showing of his actual need for the water within a reasonable time in the future" (*id.* at 22), and continued (*ibid.*):

> The lack of evidence that New Melones Project water will be needed for consumptive use outside the four basin counties for many years

> to come, if ever, or that it will be used within these counties at any definite time in the future, raises substantial doubt whether permits should be issued to impound more water in New Melones Reservoir, at least at this time, than is needed for satisfaction of prior rights and non-consumptive purposes—protection and enhancement of fish and wildlife, water quality, recreation and generation of power. [Footnote omitted.]

"To help resolve this doubt," the Board said, it "must consider any adverse consequences of such impoundment" (*id.* at 23). The Board noted that the proposed reservoir would inundate approximately 13 miles of the Stanislaus River now used for whitewater rafting and stream fishing, and it concluded that boating and fishing on the new reservoir "would not adequately substitute for the present recreational uses of the river" (*ibid.*). It concluded (*id.* at 24):

> In view of the preponderance of the adverse consequences of maintaining a reservoir of the size proposed by the Bureau, the public interest requires that any permits issued pursuant to [the Bureau's applications] prohibit the impoundment of water in New Melones Reservoir for consumptive purposes until further order of the Board following a showing that the benefits that will accrue from a specific proposed use will outweigh any damage that would result to fish, wildlife and recreation in the watershed above New Melones Dam and that the permittee has firm commitments to deliver water for such purposes.

Although the Bureau had designated a much larger service area for use of the project's water (*id.* at 19), the Board found that the full yield of the project would eventually be needed in Tuolumne, Calaveras, San Joaquin, and Stanislaus counties (which "include substantial areas in the Stanislaus River basin") (*id.* at 21), and that the Bureau had made no showing of need outside those four counties (*id.* at 24). Accordingly, the Board determined that the permits issued to the Bureau should restrict the place of use of the water for consumptive purposes to those four counties (*ibid.*).[8] The Board held that this preference was required both by state law and by the 1962 Act of Congress authorizing the New Melones Project (*ibid.*).

Finally, the Board considered whether "the project's power benefit alone justifies storage in addition to that presently needed for other purposes"—that is, "whether the need for maintaining the present regimen of the stream outweighs the need for an additional increment of generating capacity during the interim period" (A. II, 27). The Board noted that the annual benefits of the power functions of the proposed project (which would produce 430,000 megawatts annually) were calculated at more than $5.5 million, and that "[t]he opportunity to contribute to

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[8] The Board noted that the permits should also provide that the Board would consider a petition to allow use in areas outside the four counties if the Bureau could show that no other water from the Central Valley Project was available to serve those areas; but use outside the four counties would remain subordinate to use within them (*ibid.*).

the solution of the present power supply problem should not be overlooked" (*ibid.*). But it found that "[t]he recreational uses in question have a value beyond that described by dollar resources only" (*id.* at 28), and went on to rule:

> In view of the foregoing, the Board finds that the reach of river in question is a unique asset to the state and the nation. Until the need for water for consumptive purposes dictates approval of increased storage, the public interest requires that storage for power purposes also be kept at reduced levels. [*Id.* at 28–29.]

In summary, the Board concluded (A. II, 31–32):

> There is unappropriated water available to satisfy the demands of the project as proposed. However, the Bureau has no definite plan as to when or at what specific locations project water will be used for consumptive purposes outside the four basin counties, and it has sufficient surplus water from other sources to meet future increased demands outside these counties for a long period of years. Permits should not be issued for use of water outside these counties at this time.
>
> The public interest requires that the use of the Stanislaus River for whitewater boating, stream fishing and wildlife habitat be protected to the extent that water is not needed for other beneficial uses. Therefore, although there is a demonstrated need for the full yield of the project in the four basin counties at some time in the future, but for which no contracts have been negotiated, and in view of the adverse effect the proposed reservoir will have upon these recreational uses, impoundment of water to satisfy that need should not be permitted at this time. Instead, the Board should retain jurisdiction over the permits for the purpose of approving incremental appropriations for consumptive use up to the quantities covered by the applications when the need for the water is substantiated.

* * * * *

> Beneficial use of project water can be made for the generation of power. However, preservation of the existing upstream reach of the river for recreation values conflicts with increased storage for power purposes. Therefore, storage for power generation should be approved, but limited to the amount authorized for other project purposes.
>
> By dedicating the initial project yield to demonstrated needs for flows for water quality control and for fish and wildlife preservation and enhancement and allowing use of these flows for power generation, and by deferring significant impairment of upstream recreational values until a need for other uses is demonstrated, the Board's decision assures the maximum public benefit and maximum utilization of the available resources in the public interest.

In accord with these conclusions, the Board approved the assignment of the State Department of Finance applications to the Bureau, and it approved "in part" those applications and the ones originally filed by the Bureau, but determined that the permits issued to the Bureau should be subject to 25 "conditions and limitations" (A. II, 32–40). These condi-

tions (which are discussed more specifically at pp. 57–86, *infra*) would have the following general effects: (1) prohibiting full impoundment of the waters sought by the Bureau until the Bureau could demonstrate to the Board's satisfaction that the benefits would outweigh the damage and that the Bureau had firm commitments to deliver the water;[9] (2) limiting or controlling the use of project water;[10] (3) reserving jurisdiction in the Board to impose further conditions governing the use of project water;[11] (4) affecting construction and design of the project;[12] (5) imposing on the Bureau various requirements that it report to the Board on the continuing operation of the project;[13] (6) requiring the Bureau to afford access to the project to persons designated by the Board and to members of the public;[14] and (7) imposing other requirements.[15]

C. THE DISTRICT COURT DECISION

The United States then brought the present action against the petitioners (the State Water Resources Control Board, the members of the Board, and the State of California) in the United States District Court for the Eastern District of California (A. I, 11–

[9] See Conditions 1 and 2 (A. II, 33–34; see pp. 61–66, *infra*).

[10] See Conditions 4, 5, 14, 19, 20, 23, 24, 25 (A. II, 35–40; see pp. 67–75, *infra*).

[11] See Conditions 2, 6, 9, 13 (A. II, 34–37; see pp. 75–78, *infra*).

[12] See Conditions 3, 10, 11, 17, 18 (A. II, 34–38; see pp. 78–80, *infra*).

[13] See Conditions 3, 7, 8, 12, 22 (A. II, 34–39; see pp. 80–81, *infra*).

[14] See Conditions 15 and 16 (A. II, 37–38; see p. 82 *infra*).

[15] See Conditions 17 and 18 (A. II, 38).

20). The United States sought a declaratory judgment that the conditions imposed in the permits issued by the Board pursuant to Decision 1422 are void; that the United States may appropriate unappropriated water necessary for federal reclamation projects in California without applying to the Board for a permit; and that if the United States applies for a permit as a matter of comity, the Board must grant the permit if sufficient unappropriated waters are available (A. I, 43–44). Petitioners moved for summary judgment. They conceded that, because of the national implications of the reclamation of arid and semiarid lands, Congress has power to reserve control over federal reclamation projects to the federal government (A. I, 55). They contended, however, that Congress has not done so. They argued that Section 8 of the Reclamation Act of 1902 requires the United States both to acquire water rights for reclamation projects by obtaining permits pursuant to state laws and to comply with the terms and conditions that the States may impose on those permits, so long as the conditions are not expressly prohibited by federal law (A. I, 66).

The district court issued a summary judgment holding that the United States may appropriate any unappropriated water necessary for a federal reclamation project in California; that it must first, as a matter of comity, apply to the State for a determination of the availability of sufficient unappropriated water; but that the State may not impose conditions on the permits issued as a result of those applications

(*id.* at 96). Accordingly, the court declared Decision 1422 void insofar as it attempted to impose such conditions (*ibid.*).

Appraising the legislative history of the Reclamation Act, the court determined that it did not support petitioners' interpretation of Section 8 but "indicates the opposite interpretation: that reclamation is an undertaking of national concern, transcending the often arbitrary geographic boundaries of individual states and territories" (*id.* at 67). The court held that "the comity inherent in a federal system" requires the federal government when acquiring water for its reclamation projects "to comply with the forms of state law, including application to state water boards where necessary, for two purposes: (1) to enable the state to determine, according to its law, whether there is sufficient unappropriated water available for the project; and (2) to give notice to the state of the scope of the project" (*id.* at 69). The court found the prior decisions of this Court interpreting Section 8 to be generally supportive of this view (*id.* at 77), and it found that the Bureau's administrative practice was consistent with its position in this case—"that the Bureau does and will respect existing state water laws and further, that the Bureau does and will comply with state filing requirements *on the basis of comity*" (*id.* at 88–89; emphasis in original).

The court rejected petitioners' contentions that the United States was estopped from attacking Decision 1422 in federal court; the State Board had no jurisdiction to impose terms and conditions on the federal

government, the court held, and hence the United States was not bound to pursue California appellate remedies but could turn to federal court for an interpretation of the applicable federal law (*id.* at 90–92). The court found it unnecessary to decide whether the conditions and terms imposed by Decision 1422 alter or conflict with the purposes of the New Melones Project, in view of its conclusion that the State Board lacked power to impose any conditions on the Bureau's permits (*id.* at 92–93).

Accordingly, since petitioners had conceded by moving for summary judgment that there were no material facts at issue, the court granted summary judgment in favor of the United States, and it entered a declaratory judgment consistent with its opinion (*id.* at 94–96).

D. THE COURT OF APPEALS DECISION

The court of appeals affirmed, "substantially for the reasons stated by Judge MacBride in his opinion" (A. I, 29). The court found additional support for its conclusion in two recent decisions, *Hancock* v. *Train,* 426 U.S. 167, and *Environmental Protection Agency* v. *California,* 426 U.S. 200, in which this Court declined to read statutory language subjecting federal instrumentalities to state law as requiring compliance with state permit requirements (A. I, 29–32). The court of appeals disagreed, however, with the district court's conclusion that the United States is required to obtain state water permits for reclamation projects only as a matter of comity; the court

of appeals held that Section 8 of the Reclamation Act itself requires the United States to invoke the permit procedures provided by state law (*id.* at 33–34).

Judge Carter concurred specially (*id.* at 34–35). He noted his agreement with the panel's interpretation of *Hancock* v. *Train* and *Environmental Protection Agency* v. *California,* and added that he could not "envision the Congress providing that the states, by a permit process, may control the operation of federally constructed, funded, and operated water and power projects" (*ibid.*).

Judge Wallace concurred in part and dissented in part. He agreed that "the language of the statute reviewed here is insufficient to validate California's permit procedure," but rejected the majority's conclusion that Section 8 (or comity) requires the United States to comply with the forms of state law (*id.* at 35–38).

On petition for rehearing, the court of appeals rejected petitioners' contention that the conditions in certain of the permits were valid because a state agency, the Department of Finance, had originally filed the permit applications and later assigned them to the Bureau (*id.* at 38–41). The court concluded that under California law the state agency acquired, and later assigned to the United States, not a permit subject to certain conditions, but only an application for a permit, which carries only a priority right over later applicants. When the applications were assigned they were not subject to the conditions at issue, which

were imposed later by the Board. The court also noted that in this case the assignee was "the Bureau, a Federal agency exercising powers conferred upon it by the Congress of the United States, whose valid enactments are 'the supreme Law of the Land' " (*id.* at 38).

Judge Wallace concurred (*id.* at 41), stating that there was no need to reach any constitutional issue because the court's first ground—that the assignment was merely of an application, not of a conditional permit—was "more than adequate."

INTRODUCTION

The first and fundamental question in this case is whether Section 8 of the Reclamation Act of 1902 authorizes a State to regulate the operation and uses of a federal reclamation project by imposing conditions on the permits it grants to authorize the appropriation of water for the project. Petitioners suggest (Br. 40–45), however, that there is an anterior question. They discuss the issue whether the federal government in acquiring its water rights for a reclamation project must invoke the State's permit procedures at all, or instead can "acquire its water rights independently of state law" (Br. 45), perhaps by invoking the doctrine of reserved federal water rights (see Br. 40–48).

As petitioners themselves emphasize, this question is essentially academic, since "historically * * * the Bureau, under section 8, has acquired its water rights under state law" (Br. 45; see *id.* at 36–40). The Secretary of the Interior in performing his functions under

the reclamation laws has indeed followed the formal procedures of state appropriative law whenever possible, and he did so in this case.[16]

We took the position in the courts below that this custom of the Secretary was not legally required, but was followed only as a matter of "comity." While the district court agreed (A. I, 87–89), the court of appeals concluded that Section 8 itself requires the Secretary to comply with state appropriative procedures to the extent necessary to achieve the two purposes noted by the district court: enabling the State to determine whether there is sufficient unappropriated water available for the project, and giving notice to the State of the scope of the project (A. I, 34).

We do not here challenge the conclusion of the court of appeals on this point. Since the Secretary followed state procedures in this case (and does so regularly), the ruling has no practical effect in this case. And since no evidence was introduced concerning any circumstances in which the Secretary might conclude that comity would not require him to comply with state appropriative procedures, this case does not present an adequate record on which to base a decision

[16] As petitioners note (Br. 43–45), the federal government's compliance with state permit procedures serves the purposes of enabling the State to "quantify the federal water right" and to quantify "the amount of unappropriated water that remains available for use by others" (Br. 43), as well as enabling the State to determine in the first place whether there is sufficient unappropriated water available for the project (see the district court's opinion, A. I, 69).

whether Section 8 requires such compliance as a matter of law.[17]

The disputed issue, thus, is not whether the Secretary must follow the formal requirements of state law in acquiring water rights for a reclamation project. The issue is whether, if he does, Section 8 authorizes the State to place conditions on its appropriation permits so as to achieve a significant measure of control over the operation and uses of the project.

SUMMARY OF ARGUMENT

I

This case is controlled by prior decisions of this Court.

Petitioners claim that Section 8 of the Reclamation Act authorizes a State to place conditions on the permits it grants for the water needed for a federal reclamation project and thus to control and regulate the operations and uses of the project. For example, the first two conditions imposed by Decision 1422 prohibit the Bureau of Reclamation from fully impounding the project waters behind the New Melones Dam—as the Secretary of the Interior has decided to do—until the Bureau demonstrates to the state Board that

[17] Similarly, although petitioners discuss the matter at some length (Br. 40–48), this case does not present the question whether the United States has reserved water rights to the water needed for the New Melones Project. The United States has never claimed any reserved rights in connection with this project, and does not do so before this Court. Whether such rights might be claimed in connection with a reclamation project (*cf. Cappaert* v. *United States*, 426 U.S. 128, 144, n. 9) is not at issue here.

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the benefits of doing so will outweigh the disadvantages (A. II, 34).

Petitioners' claim is at war with the decisions of this Court in *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275; *City of Fresno* v. *California,* 372 U.S. 627; and *Arizona* v. *California,* 373 U.S. 546. In those decisions the Court has stated:

> As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. * * * We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State.

Ivanhoe, supra, 357 U.S. at 291–292; accord, *City of Fresno, supra,* 372 U.S. at 629–630; *Arizona* v. *California, supra,* 373 U.S. at 586–587.

Those decisions recognize that Section 8 "leave[s] to state law the definition of the property interests, if any, for which compensation must be made" (*City of Fresno, supra,* 372 U.S. at 630). They make it clear, however, that Section 8 does "not subject the Secretary to state law in disposing of water * * *" (*Arizona* v. *California, supra,* 373 U.S. at 587).

The most complete statement of the rationale of those decisions appears in the most recent case, *Arizona* v. *California.* The Court began: "The argument that § 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities

laid down by state law has already been disposed of by this Court" in *Ivanhoe* and *City of Fresno* (373 U.S. at 586). After quoting *Ivanhoe* (*ibid.*), the Court stated that "where the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of waters to users, state law has no place" (*id.* at 588).

"It was only natural," the Court continued, "that the United States, which was to make the benefits available and which had accepted the responsibility for the project's operation, would want to make certain that the waters were effectively used" (*id.* at 589). The "vast, interlocking machinery" of the Boulder Canyon Project "could function efficiently only under unitary management," and "[r]ecognizing this, Congress put the Secretary of the Interior in charge of these works and entrusted him with sufficient power, principally the * * * contract power, to direct, manage, and coordinate their operation" (*id.* at 589–590). Unitary federal control was essential, since subjecting the Secretary to the varying and possibly inconsistent commands of the States "could frustrate efficient operation of the project and thwart full realization of the benefits Congress intended this national project to bestow" (*id.* at 590).

The same analysis has governed this Court's interpretation of comparable statutory provisions such as Section 27 of the Federal Water Power Act, 41 Stat. 1077 (16 U.S.C. 821). *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 328 U.S.

152, 164; *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 445–446.

Faced with this Court's decisions under Section 8, petitioners seek to limit each case to its narrow facts and challenge what they characterize as "dicta," but ultimately they recognize that acceptance of their position would require the Court to overrule those decisions. There is no reason for it to do so. The position the Court has taken is not only consistent with the language and legislative history of Section 8 and with the administrative practice under it, but accurately reflects the policies embodied in the 1902 Act, in the subsequent reclamation laws, and in other federal statutes applicable to reclamation projects.

II

It is necessary to review the conditions imposed on the New Melones Project by Decision 1422. This review demonstrates, among other things, the fallacy of petitioners' claim that the conditions are consistent with the purposes of the project.

A. Conditions 1 and 2 (A. II, 33–34) prohibit full impoundment of the New Melones reservoir until the Bureau of Reclamation is able to convince the state Board that the benefits of doing so will outweigh the disadvantages.

The purposes of the New Melones Project, as stated in the 1962 authorizing Act and in the project report that Congress approved, include flood control, irrigation, power generation, recreation, conservation of fish and wildlife, and municipal, industrial, and

domestic water consumption. Congress directed that the project become "an integral part of the Central Valley Project" and that it "be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements" (76 Stat. 1180, 1191). The project report, which California endorsed at the time of the 1962 congressional authorization, provided for a reservoir with a capacity of 2,400,000 acre feet.

When the United States applied for permits to appropriate the water to fill the reservoir, the state Board determined that sufficient unappropriated water was available but nonetheless imposed Conditions 1 and 2. Condition 1 limits the amount appropriated to 1,420,000 acre feet and bans use of this water for the purposes of irrigation or municipal, industrial, or domestic consumption. Power production is permitted, but the substantial reduction in the quantity of water correspondingly reduces the amount of power that can be generated (and the amount of revenues that can be earned).

Condition 2 then limits the impoundment to the quantity of water necessary to provide annual releases of 98,000 acre feet for the purposes of fish and wildlife (plus the amounts necessary for water quality control, satisfaction of prior rights, and flood control). No additional impoundment is allowed for power, recreation, or new irrigation.

These restrictions apply "[u]ntil further order of the Board." Such order "shall be preceded by a showing that the benefits that will accrue from a specific

proposed use will outweigh any damage that would result to fish, wildlife and recreation in the watershed above New Melones Dam and that the [Bureau] has firm commitments to deliver water for such other purposes" (A. II, 34). In making this determination, the Board would have to find that "the specific intended use" was "reasonable, beneficial and *in the public interest*" through "a balancing of competing demands and policy considerations and [the exercise of] broad discretion" (A. II, 21; Board's emphasis).

These conditions give effect to the Board's policy judgments that (1) the recreational uses of the new reservoir would not adequately substitute for the current recreational use of the river for white water rafting and stream fishing, and (2) that the economic benefits of power production would not outweigh the loss of these recreational opportunities. The Board did not consider whether the value of irrigation and of municipal, industrial, and domestic uses would result in outweighing the loss of the existing recreational opportunities, since it concluded that the Bureau had no "firm commitments" to provide water for these uses.

Nevertheless, Condition 2 makes the Board's future authorization of additional impoundment dependent on its determination that the "benefits" will outweigh the "damage" even after the Bureau has made "firm commitments" to deliver water for purposes expressly authorized by Congress.

Conditions 1 and 2 would impair the congressionally authorized purposes of the project by prohibiting the Bureau from impounding the full quantity of water required for those purposes and by specifically prohibiting the use of project water for certain of those purposes. By interfering particularly with the project's irrigation and power functions, which are the main sources of the revenues needed to offset project costs, these conditions would undermine the project's economic viability. By halting impoundment of the reservoir behind the completed dam, these conditions flout the congressional directive that the project be "prosecuted as vigorously as may be consistent with budgetary requirements" (76 Stat. 1180, 1191). In general, the continuing authority claimed by the Board to determine whether the project's purposes should be allowed to proceed is inconsistent with the congressional designation of those purposes.

B. Conditions 4 and 25 (A. II, 35, 40) limit the consumptive use of project water to four named counties. The Board states that it will consider authorizing such use in other areas only on a showing that water from other Central Valley Project sources is not available to serve those areas, and that in any event use outside the four counties is prohibited if the water is "necessary for the development" of those counties.

These conditions are inconsistent with the authorized purposes of the project in several respects. The requirement that water from other Central Valley Project sources be unavailable before New Melones water can be used outside the four counties prevents

the integration of New Melones with the Central Valley Project as Congress directed. The same effect flows from the ban on any use of New Melones water outside the four counties if the Board determines that the water is needed for "the development" of those counties. Moreover, while the authorizing Act directs the Secretary of the Interior to determine the water needs of "the Stanislaus River Basin," and give preference to those needs, before diverting New Melones water to other areas, the "Stanislaus River Basin" is not necessarily coterminous with the four counties that the Board prefers. Nor does the Act refer to "the development" of those counties. Most important, Conditions 4 and 25 claim for the state Board the power to make determinations of water needs and to allocate water on the basis of those determinations, whereas the Act vests that power in the Secretary of the Interior.

C. Condition 5 (A. II, 35–36) requires that water be released from the New Melones reservoir for the purpose of water quality control so as to maintain a concentration of dissolved solids specified in the Condition and a concentration of dissolved oxygen specified in the Board's interim water quality control plan. It further provides that if the interim plan is amended or superseded, the requirements for water quality releases will be modified accordingly. Condition 20 (A. II, 39) reserves to the Board authority to modify the total quantity of water diverted by the project if it should find such modification necessary "to meet water quality objectives in water quality

control plans which have been or hereafter may be established or modified."

Condition 5 does not "reaffirm" the contractual obligation assumed by the Bureau in a 1969 agreement with California's Central Valley Regional Water Quality Control Board, as petitioners contend, but constitutes a one-sided rewriting of that agreement. As its decision shows (A. II, 17–19), the state Board has dropped the limitations that the agreement imposed on the water quality obligations of the New Melones project—specifically, a ceiling on the required releases and a provision that, if conditions required, water quality releases would be restricted to the irrigation season.

Conditions 5 and 20 are inconsistent with the project's purposes because Condition 5 overrides the limitations on the water-quality releases that the Bureau found necessary to protect the other purposes of the project. In addition, the open-ended authority reserved by the Board under Conditions 5 and 20 to require even greater water-quality releases in the future—up to the full yield of the project—could further impede the project's commitments to the other needs and purposes for which it was authorized by Congress. In any event, it is inconsistent with the congressional scheme to vest this decision-making power in the state Board rather than in the Secretary.

It is noteworthy that the state Board, in imposing these water-quality conditions, has overidden an agreement between the federal Bureau and a California water quality control board. This action illustrates

that, rather than promoting state-federal accommodation, the power claimed by petitioners encompasses the unilateral abrogation of federal-state coordination that exists under the present statutory scheme.

D. A review of the 25 conditions imposed by Decision 1422—including many that have not been summarized here but that are discussed below, pp. 75–82, *infra*—demonstrates that, individually and cumulatively, they are not consistent with the purposes of the project. By these conditions the state Board seeks to undo decisions made by Congress and decisions made by federal agencies pursuant to authority granted them by Congress. Even if it were true that the Board's ruling "conflicts only with a federal administrative decision" (Pet. Br. 68), that decision—which petitioners do not claim to be outside the authority delegated by Congress—must prevail under established principles of federal supremacy.

A review of the Board's conditions demonstrates something else. The process of comparing each of the conditions with the purposes of the project is not only laborious, but requires descent to the level of operational detail and specification of project purposes out of a complex process of planning and authorization. It would also require, on petitioners' theory, separation of Congress's "own" decisions, which petitioners concede must control, from the decisions Congress delegated to the Secretary of the Interior, which petitioners claim the state Board may override. Such a process, which petitioners' interpretation of Section 8 will require with respect to a great many reclamation

projects is not an appropriate task to be imposed on the federal courts for them to undertake as a matter of law.

III

Petitioners recognize that the States must defer to "the specific laws and policies established by Congress, including the purposes of its individual projects" (Br. 59). But they contend that unless a specific decision—such as the date of impoundment of the New Melones reservoir—has been made by Congress itself, state agencies should be free to "fill in these details" (Br. 60), even if that means overriding the decision of the Secretary of the Interior (Br. 68). Petitioners' proposal is contrary to the legislative and administrative scheme that Congress has constructed. There is no room in that scheme for the kind of state controls over federal reclamation projects that petitioners seek to establish.

A. Federal reclamation projects are direct federal undertakings, financed, constructed, owned, and operated by the federal government. Federal installations and facilities are traditionally free from state regulation, and cases finding "preemption" where there is a federal regulatory scheme, or a federal licensing program, apply *a fortiori* here. See *Hancock* v. *Train,* 426 U.S. 167; *Environmental Protection Agency* v. *California,* 426 U.S. 200.

In addition, reclamation projects often involve more than one State, a fact cited to the 1902 Congress as requiring a federal program. If States may unilaterally impose conditions on such projects, *which* State's

conditions shall govern? While New Melones involves only a single State, Section 8 cannot be interpreted one way in such a case and differently in "interstate" situations.

B. Congress has adopted a comprehensive array of reclamation laws and policies that leaves no room for mandatory state controls. The 1902 Act itself delegated to the Secretary of the Interior broad authority to carry out the reclamation program. A series of amendments in 1911, 1914, 1920, and 1939 broadened the authority of federal officials and established an expanding list of substantive policies to be implemented through the reclamation laws. This policy infusion has been reflected not only in general amendments to the reclamation laws but in various acts authorizing individual projects.

In addition, Congress during the past 20 years has enacted a variety of broader laws that govern reclamation projects as well as other federal undertakings. These include the Fish and Wildlife Coordination Act of 1958, 72 Stat. 563 (16 U.S.C. 661 *et seq.*), the Federal Water Project Recreation Act of 1965, 79 Stat. 213 (16 U.S.C. 460*l*–12 *et seq.*), and the Federal Water Pollution Control Act, 86 Stat. 816 (33 U.S.C. (Supp. V) 1251 *et seq.*). All these statutes set forth new federal policies and procedures that apply to reclamation projects.

Still more broadly, the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852 (42 U.S.C. 4321 *et seq.*) applies to reclamation projects, as to all other federal undertakings that may affect the quality of the environment, and requires an environmental

impact statement analyzing the evironmental consequences of a proposed project and the available alternatives. The impact of NEPA with respect to a proposed reclamation project is felt both by Congress at the time of the authorization and by the Secretary of the Interior, along with other federal officials, at the time of planning and implementation decisions. If a state agency may subsequently impose its own unilateral conditions on the project, the application of NEPA to the federal decision-making process can be overridden and its purpose defeated.

C. Congress has also responded to the States' desire for a voice in the formulation of reclamation policy and the shaping of individual projects. In a series of enactments, including most of those just mentioned (NEPA in particular), Congress has required the responsible federal officials to consult and coordinate with the States.

The planning of a reclamation project under the Flood Control Act of 1944—under which New Melones was authorized—involves the affected States at several levels. These procedures were followed in the case of the New Melones Project. The State of California was involved in the formulation and planning of the project, and the State's report endorsing the project was submitted to Congress at the time of the 1962 authorization. Federal-state consultation continued after the authorization, as illustrated by the 1969 agreement on water quality control.

These detailed procedures that Congress has provided for federal-state coordination would be pointless

if, as petitioners contend, a state agency may unilaterally impose conditions on a project by including them in appropriative permits.

D. Planning, constructing, and operating a reclamation project are complex undertakings, as this Court has recognized (*Arizona* v. *California, supra,* 373 U.S. at 589). While Congress has provided for extensive federal-state coordination, it has also recognized that someone must have the final administrative authority. Not unnaturally, Congress has lodged that authority in the federal government, and the Secretary of the Interior in particular. Petitioners would lodge it in a state agency, at least "where Congress has not spoken" (Br. 59). Their proposal is not only contrary to the established legislative scheme, but unworkable. It would invite repeated recourse to the state Board by groups or individuals who did not get what they wanted from Congress or the Secretary of the Interior. It would invite repeated rulings by the state Board, as here, on whether or not particular aspects of a project were specifically covered by what Congress had "spoken." And it would invite repeated litigation in which it would be left to the federal courts to determine whether individual conditions imposed by the state Board, such as the 25 conditions involved here, would or would not "impair the purposes" of a project. The practical result would be to transfer to the courts, as arbiters of the federal-state conflict, the administrative decision-making authority over the project that Congress gave to the Secretary of the Interior.

IV

The language, the legislative history, and the administrative construction of Section 8 all support this Court's interpretation in *Ivanhoe, City of Fresno,* and *Arizona* v. *California, supra.*

The legislative history demonstrates that the 1902 Congress viewed reclamation as a matter of national concern, transcending the interests and capabilities of individual states and necessitating the employment of broad federal powers. Section 8 as passed by the Senate provided that "State * * * laws shall govern and control in the appropriation, use, and distribution of the waters rendered available by the works constructed under the provisions of this act," but this language was deleted by the House and state law given the restricted role that it bears in the final Act.

The legislative history in the House supports the view that this role was designed primarily to require the federal government, in obtaining water for reclamation projects, to recognize vested state water rights for the purpose of determining the property interests for which compensation must be paid. The legislative history also provides some support for the view that Congress intended the Secretary to comply with the formal requirements of state law "in matters of recording appropriations of water and in establishing and maintaining the rights of users * * *," in order to enable the State to determine whether sufficient unappropriated water was available and to give notice to the State of the scope of the project. This is consistent with

the Secretary's administrative practice under the Act, as in this case.

The language of Section 8 points to no different conclusion. Even if the direction to the Secretary to "proceed in conformity with" state laws were read as referring to something more than formal legal requirements concerning proprietary rights, the laws referred to are only those laws "relating to the control, appropriation, use, or distribution of water *used in irrigation*" (emphasis added). The conditions imposed by Decision 1422 have little to do with irrigation.

V

Finally, petitioners contend that the United States is barred from challenging the conditions imposed by Decision 1422 for reasons of estoppel, collateral and otherwise. The contention is without merit.

Collateral estoppel precludes a party from relitigating the same issue that was contested and decided in an earlier action. Here, the issue on which petitioners claim the United States to be estopped—whether the permit conditions were consistent with the project's purposes—was not decided by the state Board. Even if it had been, the Board's decision would not have collateral estoppel effect if the United States is correct in its position that the Board lacked authority to impose the conditions on its permits. The United States made clear to the Board that it was reserving the right to challenge any conditions the Board might impose.

Petitioners' claims based on the equitable doctrines of estoppel, election, or waiver are likewise without merit.

The fact that two of the permit applications were originally filed by a state agency, and subsequently assigned to the Bureau of Reclamation, requires no different result. As the court of appeals held, applying California law, the assignment was only of an application—not of a permit with conditions—and there is no claim that the assignment was conditioned on the Bureau's acceptance of any conditions that might subsequently be attached to resulting permits.

I

DECISIONS OF THIS COURT FORECLOSE THE CLAIM THAT A STATE MAY IMPOSE CONDITIONS ON A FEDERAL RECLAMATION PROJECT

Petitioners claim that Section 8 of the Reclamation Act authorizes a State, in issuing permits to the federal government to appropriate previously unappropriated water for a federal reclamation project, to impose conditions that give the State a substantial measure of control over the operation of the project. For example, the first two of the 25 conditions imposed on the New Melones Project by Decision 1422 would prohibit the Bureau of Reclamation from fully impounding project waters behind its dam "until the Bureau develops a plan for their use" (Pet. Br. 67) which is satisfactory to the state

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Board—in the words of Condition 2 (A. II, 34), until the Bureau presents the Board with "a showing that the benefits that will accrue from a specific proposed use will outweigh any damage that would result * * * and that the [Bureau] has firm commitments to deliver water for such other purposes." [18]

Petitioners' contention that Section 8 authorizes a State to impose such conditions on the operation of a federal reclamation project is at war with a line of decisions of this Court. We will now review those decisions.

A. NEBRASKA *v.* WYOMING

The first case in which the Court adverted to state control of reclamation projects was *Nebraska* v. *Wyoming,* 325 U.S. 589, decided in 1945. That was an original action between States, seeking an equitable apportionment of the North Platte River, in which the United States intervened. The United States claimed "that it owns all the unappropriated water in the river" by virtue of its original ownership of all the surrounding lands (*id.* at 611). The Court bypassed this claim. It noted that the Secretary of the Interior had applied for state permits to appropriate water for reclamation projects on the river, pursuant to Section 8 of the Reclamation Act, and that "[t]hose filings were accepted by the state officials as adequate under state law" (*id.* at 613). Thus, "the water rights on which the North Platte Project and the Kendrick Project rest have been obtained in

[18] See pp. 59–66, *infra*; for a full review of the conditions imposed by Decision 1422, see pp. 57–86, *infra.*

compliance with state law. Whether they might have been obtained by federal reservation is not important." *Id.* at 612.[19]

The question remained whether the water rights obtained under state law belonged to the United States or to the individual users of the project water. The Court held that since "[t]he contracts between the United States and the irrigation districts provided that after the stored water was released from the reservoir it was under the control of the appropriate state officials" (*id.* of 613), and the state officials then caused the State to issue permits which "named as appropriators the individual landowners" (*ibid.*), the rights belonged to the individual landowners rather than the United States (and hence were apportionable to their respective States). "[T]he appropriations under state law were made to the individual landowners pursuant to the procedure which Congress provided in the Reclamation Act" (*id.* at 615).

The United States had expressed the fear that this conclusion might give the States control over the management and operation of federal projects. The court responded to this fear with a statement that it has quoted and followed in the subsequent cases (see pp. 43–44, 48–49, *infra*):

> It is argued that if the right of the United States to these water rights is not recognized,

[19] The Court also said (*id.* at 615): "We intimate no opinion whether a different procedure might have been followed so as to appropriate and reserve to the United States all of these water rights. No such attempt was made."

its management of the federal projects will be jeopardized. It is pointed out, for example, that Wyoming and Nebraska have laws which regulate the charges which the owners of canals or reservoirs may make for the use of water. *But our decision does not involve those matters. We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system.* We are dealing here only with an allocation, through the States, of water rights among appropriators. *The rights of the United States in respect to the storage of water are recognized.* So are the water rights of the landowners. To allocate those water rights to the United States would be to disregard the rights of the landowners. To allocate them to the States, who represent their citizens *parens patriae* in this proceeding, *in no wise interferes with the ownership and operation by the United States of its storage and power plants, works, and facilities.* Thus the question of the ownership by the United States of unappropriated water is largely academic so far as the narrow issues of this case are concerned. [325 U.S. at 615–616; emphasis added; footnote omitted.] [20]

[20] Petitioners rely (Br. 48–49) on the Court's decision ten years earlier on a procedural point in the same case, *Nebraska* v. *Wyoming*, 295 U.S. 40. At that time the United States had not yet intervened in the case; Wyoming moved to dismiss Nebraska's complaint on the ground that the United States was an indispensable party, and the Court denied the motion. The first paragraph that petitioners quote from the opinion (Br. 48) is from the paragraph in which the Court recited "[t]he allegations of the bill, in summary * * *" (295 U.S. at 41–42).

B. IVANHOE IRRIGATION DISTRICT *v.* M'CRACKEN

The next case was *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275, decided in 1958. The California Supreme Court there had held invalid certain provisions in contracts between the United States and two California irrigation districts and a water agency for the furnishing of Central Valley Project water (47 Cal. 2d 597, 306 P. 2d 824; see 357 U.S. at 285–289). The contracts contained provisions incorporating the requirement of Section 5 of the Reclamation Act of 1902 [21] prohibiting the furnishing of project water to lands in excess of 160 acres in single ownership, and the requirements of the Reclamation Project

The second paragraph petitioners quote (Br. 48–49) is from the Court's discussion of Wyoming's contention that the suit must be dismissed because the United States was not made a party (295 U.S. at 43). The Court stated: "The bill alleges, and we know as a matter of law [citing Section 8 of the Reclamation Act], that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under state law" (*Ibid.*).

As noted earlier (pp. 19–21, *supra*), the United States does not here challenge the proposition that the Secretary "must obtain permits and priorities for the use of water from the State * * *." While the issue thus is not disputed here, it would not be reasonable to read the Court's statement in ruling on the procedural point in *Nebraska* v. *Wyoming* as conflicting with its opinion on the merits ten years later, in which it expressly left open the question whether the United States might have successfully claimed a reserved right to the water, or followed some other procedure, instead of proceeding under state law (325 U.S. at 614, 615, quoted at page 39 and note 19, *supra*). See *Arizona* v. *California*, 373 U.S. 546, 588 n. 92.

[21] 32 Stat. 389.

Act of 1939 [22] that water users repay certain project costs over a 40-year period. See 357 U.S. at 285–287. The California Supreme Court held that these contract provisions violated California law, and that California law governed by virtue of Section 8 of the Reclamation Act of 1902, by which "the federal government * * * has recognized that the law of this state is determinative of rights to water in this state" (47 Cal. 2d at 628, 306 P. 2d at 842; see 357 U.S. at 288).[23]

This Court unanimously reversed. The Court began by "set[ting] aside as not necessary to decision here the question of title to or vested rights in unappropriated water" (357 U.S. at 290–291), citing the decision on the merits in *Nebraska* v. *Wyoming, supra,* 325 U.S. at 611–616. The Court stated that "the authority to impose the conditions of the contracts here comes from the power of the Congress to condition the use of federal funds, works, and projects on compliance with reasonable requirements" (357 U.S. at 291). "And, again, if the enforcement of those conditions impairs any compensable property rights, then recourse for just compensation is open in the courts" (*ibid.*). The Court noted that the decision of the California Supreme Court "turned on the court's interpretation of § 8 of the 1902 Act" (*id.* at 289), and it analyzed the application of Section 8 as follows (357 U.S. at 291–292; emphasis added):

> As we have noted, the Supreme Court of California first concluded that the provisions of § 8 of the 1902 Act as to the application of state law were absolute, and controlled all provisions of the Act and other reclamation statutes having to do with "the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder * * *." We believe this erroneous insofar as the substantive provisions of § 5 of the 1902 Act are concerned. *As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. As the Court said in Nebraska* v. *Wyoming, supra, at 615: "We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system."* Section 5 is a specific and mandatory prerequisite laid down by the Congress as binding in the operation of reclamation projects, providing that "[n]o right to the use of water * * * shall be sold for a tract exceeding one hundred and sixty acres to any one landowner * * *." *We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State.* To read § 8 to the contrary would

[22] The repayment provisions were based upon Section 9(d) and (e) of the Reclamation Project Act of 1939, 53 Stat. 1195, 1196, as amended, 43 U.S.C. 485h (d) and (e).

[23] The court concluded that state law forbade restrictions on irrigation water deliveries based on the size of a farm. 47 Cal. 2d at 637, 306 P. 2d at 848.

> require the Secretary to violate § 5, the provisions of which, as we shall see, have been national policy for over half a century. Without passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field, we do not believe that the Congress intended § 8 to override the repeatedly reffirmed national policy of § 5. [24]

Finally, the Court rejected claims that inclusion of these provisions in the contracts violated constitutional requirements. The Court noted that the federal government had constitutional authority to undertake large-scale reclamation projects to promote the general welfare, and that "[i]n developing these projects the United States is expending federal funds and acquiring federal property for a valid public and national purpose, the promotion of agriculture. This power flows not only from the General Welfare Clause of Art. I, § 8, of the Constitution, but also from Art. IV, § 3, relating to the management and

[24] Petitioners acknowledge (Br. 52–53, n. 40) that this passage from the Court's *Ivanhoe* opinion, particularly the statement that "nothing in § 8 * * * compels the United States to deliver water on conditions imposed by the State," is contrary to their position here. They call it "dictum" and "imprecise" (*id.* at 52, n. 40). They also seek to distinguish it on the basis that "the conditions in Decision 1422 do not restrict the Bureau's 'delivery' of water, but merely defer its right to fully impound water until it develops its own plan for the delivery of water" (*id.* at 53, n. 40). But if the State cannot impose conditions on the United States' delivery of water from a reclamation project, *a fortiori* it cannot impose conditions on the impounding of the water in the first place, which is part of the construction and operation of the project.

disposal of federal property." *Id.* at 294. The Court concluded (357 U.S. at 295):

> Also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges. See *Berman* v. *Parker,* 348 U.S. 26 (1954), and *Federal Power Comm'n* v. *Idaho Power Co.,* 344 U.S. 17 (1952). The lesson of these cases is that the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof. *Conversely, a State cannot compel use of federal property on terms other than those prescribed or authorized by Congress. Public Utilities Comm'n of California* v. *United States,* 355 U.S. 534 (1958). Article VI of the Constitution, of course, forbids state encroachment on the supremacy of federal legislative action. [Emphasis added.]

C. CITY OF FRESNO *v.* CALIFORNIA

In *City of Fresno* v. *California,* 372 U.S. 627, decided in 1963, the Court, following *Ivanhoe,* again rejected the claim that Section 8 required the Secretary to follow state water law in operating a component of the Central Valley Project. In litigation over the Project's Friant Dam, the city urged that since Section 8 required the Secretary to proceed under state law, he was obliged to respect the city's California statutory priority for municipal and domestic use of water over irrigation use, its statutory priority for

use of water in its county of origin, and its statutory entitlement to water at the same (lower) rate charged for irrigation purposes (372 U.S. at 628–629).[25] Fresno thus claimed that the Secretary could not condemn water currently being used for purposes having priority under state law and then use it for irrigation, a use with lower priority under state law.[26]

The Court rejected this construction of Section 8, stating (372 U.S. at 629–630; emphasis added):

> Petitioner seems to say that § 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. § 383, requires compliance with California statutes relating to preferential rights of counties and watersheds of origin and to the priority of domestic over irrigation uses. However, § 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain. This was settled in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958). *Rather, the effect of § 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made.* [27]

[25] See the petitioner's brief in *City of Fresno* v. *State of California*, No. 51 October Term 1962, at 51–72, 140–142. See also the respondents' brief in the companion case, *Dugan* v. *Rank*, No. 31, October Term 1962, at 46–60. The claims of the parties in the lower courts and the lower court opinions are discussed in the companion case, *Dugan* v. *Rank*, 373 U.S. 609, 616–617, and n. 4.

[26] See materials cited in note 25, *supra*.

[27] The Court's view of Section 8 as concerned to assure federal compensation for the taking of property rights in water as defined by state law was earlier expressed in *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 734–736. The Court there upheld

D. ARIZONA *v.* CALIFORNIA

The Court's most recent decision interpreting Section 8 was *Arizona* v. *California*, 373 U.S. 546, decided in 1963 (subsequent to *City of Fresno*). In that case, involving allocation of the waters of the Colorado River, the Court reaffirmed its statements in *Ivanhoe* and *City of Fresno* that Section 8 did not require the United States in the delivery of reclamation project water to follow the priorities of state law.

Section 8 was made applicable to the controversy in *Arizona* v. *California* by the Boulder Canyon Project Act, 1928, ("BCPA"), 45 Stat. 1057, as amended, 43 U.S.C. 617–617t, which authorized the Secretary of the Interior to construct, operate, and maintain a dam and other works on the Colorado River. Section 14 of the BCPA, 43 U.S.C. 617m, provided that "the reclamation law" (including, of course, Section 8 of the 1902 Act) "shall govern the construction, opera-

compensation awarded against the United States for water rights impaired by the Friant Dam, and stated:

"We cannot disagree with claimants' contention that in undertaking these Friant projects and implementing the work as carried forward by the Reclamation Bureau, Congress proceeded on the basis of full recognition of water rights having valid existence under state law. By its command that the provisions of the reclamation law should govern the construction, operation, and maintenance of the several construction projects, Congress directed the Secretary of the Interior to proceed in conformity with state laws, giving full recognition to every right vested under those laws. [Citing Section 8.] * * * We think it clear that throughout the conception, enactment and subsequent administration of the plan, Congress has recognized the property status of water rights vested under California law" (339 U.S. at 734–736).

tion, and management" of the Boulder Canyon Project, except as otherwise provided, and Section 18 of the BCPA, 43 U.S.C. 617q, substantially restated Section 8 of the 1902 Act:

> Nothing herein shall be construed as interfering with such rights as the States had on December 21, 1928, either to the waters within their borders or to adopt such policies and enact such laws as they deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River Compact or other interstate agreement.

The Court held, reversing the Special Master, that while Section 8 was thus applicable, it nonetheless had no influence on the intrastate distribution of water from the Boulder Canyon Project. "[W]e hold that the Secretary in choosing between users within each State and in settling the terms of his contracts is not bound by these sections to follow state law" (373 U.S. at 586).

In so holding the Court reaffirmed both *Ivanhoe* and *City of Fresno*, stating (373 U.S. at 586):

> The argument that § 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities laid down by state law has already been disposed of by this Court in *Ivanhoe Irr. Dist.* v. *McCracken*, 357 U.S. 275 (1958), and reaffirmed in *City of Fresno* v. *California*, 372 U.S. 627 (1963).

The Court then quoted from *Ivanhoe* the passage stating that Section 8 merely requires the United States to comply with state law when it condemns water rights, that the acquisition of water rights is not to be confused with the operation of federal projects, and that nothing in Section 8 compels the United States to deliver water on conditions imposed by the State (357 U.S. at 291–292, quoted at 373 U.S. at 586; quoted at pp. 43–44, *supra*). The Court concluded:

> Since § 8 of the Reclamation Act did not subject the Secretary to state law in disposing of water in that case, we cannot, consistently with *Ivanhoe*, hold that the Secretary must be bound by state law in disposing of water under the Project Act. [373 U.S. at 587.]

The Court likewise rejected the claim that Section 18 of the BCPA—which substantially restates Section 8—required the Secretary to follow state law in the contracts he made to allocate project waters. The Court reasoned that when the federal government has "undertaken a comprehensive project for the improvement of a great river and for the orderly and beneficial distribution of water, there is no room for inconsistent state laws" (*id.* at 587). The Court added: "[W]here the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of waters to users, state law has no place" (*id.* at 588).

The Court also noted that "[i]t was only natural that the United States, which was to make the benefits available and which had accepted the responsibility for the project's operation, would want to make

certain that the waters were effectively used," and that "[a]ll this vast, interlocking machinery * * * could function efficiently only under unitary management * * *" (*id.* at 589). The Court concluded:

> Recognizing this, Congress put the Secretary of the Interior in charge of these works and entrusted him with sufficient power, principally the § 5 contract power, to direct, manage, and coordinate their operation. Subjecting the Secretary to the varying, possibly inconsistent, commands of the different state legislatures could frustrate efficient operation of the project and thwart full realization of the benefits Congress intended this national project to bestow. [*Id.* at 589–590.] [28]

[28] The significance of *Arizona* v. *California*, and its applicability to a reclamation project entirely within one State (the Central Valley Project in particular), has recently been recognized by the California Supreme Court in *Environmental Defense Fund* v. *East Bay Municipal Utility District*, 142 Cal. Rptr. 904, decided December 20, 1977. That was a suit against a California municipal utility district challenging a contract it had made with the Bureau of Reclamation to purchase water from the Central Valley Project and build a canal to divert it, on the ground that the district's decision to enter into the contract violated state constitutional and statutory provisions regarding the reasonable use of water (see 142 Cal. Rptr. at 906, 911–912). Relying on *Arizona* v. *California*, the California Supreme Court affirmed a judgment dismissing the suit. While noting that *Arizona* v. *California* involved several States rather than one, the court found that this Court's reasoning applied to single-state projects and that it represented "the proper construction" of Section 8 (142 Cal. Rptr. at 910). The California court said of this Court's decision in *Arizona* v. *California*:

"The [C]ourt held that Congress preempts state laws not only when direct conflict exists but also when danger exists in that state law either interferes with the secretary's expressly delegated powers, frustrates operation of the project, or limits the benefits of the project" (142 Cal. Rptr. at 910).

Justice Mosk dissented, arguing that the plaintiffs did not seek to impose their will on the federal government, "but merely to hold a state-created agency accountable under state law for whether and to what extent it may initiate a contract to purchase water" (*id.* at 914). But Justice Mosk noted, citing *Ivanhoe*: "If any agency were to attempt to place in issue, or to dictate to a federal bureau, the terms which the latter may impose as to the quantity, price, site or other conditions for the sale of water from a federal project, undeniably there would be preemption and federal law would prevail." *Ibid.*

[29] The Court's analysis of Section 18 of the Boulder Canyon Project Act in *Arizona* v. *California* has already been described (pp. 49–50, *supra*).

E. DECISIONS OF THIS COURT IN COMPARABLE AREAS

1. FIRST IOWA HYDRO-ELECTRIC COOPERATIVE V. FEDERAL POWER COMMISSION

The Court's interpretation of Section 8 in the cases just reviewed is consistent with its interpretation of similar provisions in other statutes.[29] Perhaps the closest analogous case is *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, which dealt with the licensing of water power projects under the Federal Water Power Act, 41 Stat. 1063, as amended, 16 U.S.C. 791a *et seq.* The Court there interpreted a provision similar to Section 8 as protecting proprietary water rights vested under state law, but not as subjecting federal projects to state veto or control.

Section 27 of the Federal Water Power Act, 16 U.S.C. 821, is similar to Section 8 of the Reclamation Act, but broader. It provides:

> That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.[28]

Section 9(b) of the Federal Water Power Act, 16 U.S.C. 802(b), further requires that an applicant for a federal license present satisfactory evidence that he "has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect * * * to the appropriation, diversion, and use of water for power purposes * * *."

On the basis of these provisions, the Federal Power Commission in *First Iowa* dismissed the petitioner's application for a license to construct a dam, reservoir, and hydro-electric power plant on the Cedar River, a navigable river in Iowa, on the ground that the petitioner had not obtained the permit required under state law. 328 U.S. at 162. State law made " 'the method of construction, operation, maintenance, and

[28] Unlike Section 8, Section 27 does not limit its reference to state laws to those relating to water "used in irrigation" (see pp. 126–129, *infra*).

equipment' " of dams subject to the approval of the state Executive Council. 328 U.S. at 165. Moreover, a central feature of the proposed plan, the diversion of "substantially all of the waters of the Cedar River near Moscow, to the Mississippi River," would have contravened state law, which required that any water diverted from a stream be returned at the nearest practicable point. 328 U.S. at 166.

This Court stated that construing Sections 27 and 9 to require the petitioner to secure the grant of a state permit as a "condition precedent" to securing a federal license "would vest in the Executive Council of Iowa a veto power over the federal project" that "easily could destroy the effectiveness of the Federal Act." 328 U.S. at 164. It recognized that Section 27 "expressly 'saves' certain state laws relating to property rights as to the use of water, so that these are not superseded by the terms of the Federal Power Act" (328 U.S. at 175). But it went on to hold:

> The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to property rights. [*Id.* at 175–176.]

The Court also found that Section 9 was aimed primarily at the marshalling of information, and that nothing in the language of that section required compliance with state laws. 328 U.S. at 177.

The Court rejected the contention that either Section 9 or Section 27 required the "subjection of the federal license to requirements of the state law on the same subject" (328 U.S. at 179). "The inappropriateness of such an interpretation is apparent," the Court said, in view of the congressional intention "to secure a comprehensive development of national resources * * *" (328 U.S. at 179–181). "The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls" (*id.* at 181). "It is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon these issues on behalf of the people of Iowa as on behalf of all others" (*id.* at 182)."

See also *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 445–446.

" Subsequent decisions interpreting and applying Section 27 of the Federal Water Power Act have emphasized its similarity to Section 8 of the Reclamation Act and have relied on this Court's interpretation of Section 8 in *City of Fresno* v. *California*, 372 U.S. 627, and *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275. See *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 453 F. 2d 463, 478 (C.A. 2), certiorari denied, 407 U.S. 926; *State of California* v. *Federal Power Commission*, 345 F. 2d 917, 923 (C.A. 9); and *Portland General Electric Co.* v. *Federal Power Commission*, 328 F. 2d 165, 176–177 (C.A. 9).

2. THE HANCOCK AND EPA DECISIONS

Finally, as the court of appeals noted (A. I, 29–32), two recent decisions of this Court provide additional support for this Court's consistent interpretation of Section 8.

In *Hancock* v. *Train,* 426 U.S. 167, 198, the Court concluded that although Congress had intended by Section 118 of the Clean Air Act, as redesignated and amended, 84 Stat. 1678, 1689, 42 U.S.C. 1857f, to require federal facilities to comply with air quality and emission standards established by the States, it had not made federal facilities subject to state permit requirements and thus authorized States to prohibit the operation of these facilities in the absence of a state permit. Invoking principles of federalism laid down in *McCulloch* v. *Maryland,* 4 Wheat. 316, 427, the Court stated (426 U.S. at 179):

> Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found **only when and to the extent there is a** "clear congressional mandate," "specific congressional action" that makes this authorization of state regulation "clear and unambiguous.". [Footnotes omitted.]

In *Environmental Protection Agency* v. *California,* 426 U.S. 200, the Court followed the reasoning of *Hancock* and concluded that Section 313 of the Federal Water Pollution Control Act, as added, 86 Stat 875, 33 U.S.C. (Supp. V) 1323, which requires federal

installations to comply to the same extent as nonfederal facilities with state "requirements respecting control and abatement of pollution," did not require federal facilities to secure a state permit as a condition of operation.[32] As Judge Carter noted in his concurring opinion in the court of appeals (A. I, 34–35), the issue presented in *Hancock* and *Environmental Protection Agency* v. *California* was closer than the issue presented here:

> I would suggest, however, that it may be one thing for the Congress to provide that a state may require a permit to assure proper air or water quality standards of a federally-owned or operated installation; it is quite another thing to permit a state to require permits for the very operation of such a facility. I cannot envision the Congress providing that the states, by a permit process, may control the operation of federally constructed, funded, and operated water and power projects.

F. CONCLUSION

Faced with this Court's decisions in *Ivanhoe, City of Fresno,* and *Arizona* v. *California,*[33] plus the Court's parallel decisions in comparable areas, petitioners seek to limit each case to its narrow facts (Br. 51–53 and n. 40, 54).[34] They proceed to challenge what they call the "dicta" in *Ivanhoe, City of Fresno,* and *Arizona* v. *California* (*id.* at 52–53 n. 40), and, ultimately, they ask the Court to overrule this established line of decisions.[35] As we will show, however, the position this Court has taken in those cases is not only consistent with the language and legislative history of Section 8 and with the administrative practice under the 1902 Reclamation Law, but accurately reflects the considerations of public policy embodied in that Act and in the subsequent legislative and administrative development of reclamation law.

[32] Petitioners note (Br. 55 and nn. 41–42) that Congress subsequently amended the provisions considered in *Hancock* and *Environmental Protection Agency* v. *California* to provide expressly that federal installations would be subject to state permit requirements. In contrast, Congress has not disturbed the Court's construction of Section 8 in the 20 years since the decision in *Ivanhoe* and the 15 years since *Arizona* v. *California.*

[33] A similar decision was rendered by the Ninth Circuit in *Turner* v. *Kings River Conservation District*, 360 F. 2d 184, where the court considered the argument that water storage for irrigation in the Pine Flat reservoir should be enjoined because the Secretary had not acquired a permit as required by California law. The court rejected the contention, stating (360 F. 2d at 198):

"We must agree with the government that 'reason precludes an interpretation of the general provisions of Section 8 of the Reclamation Act [of 1902] and Sections 1 and 8 of the Flood Control Act [of 1944] which would impute to Congress an intention to frustrate its plans for this project by subjecting it to the risk that it might never be used for some of the authorized purposes, should a state permit not be forthcoming'."

[34] Petitioners do not discuss the *First Iowa* decision.

[35] Dean Charles J. Meyers, as *amicus curiae*, acknowledging that the "*Ivanhoe dictum*" became "apparent holding" in *City of Fresno*

II

THE CONDITIONS IMPOSED IN DECISION 1422 ARE INCONSISTENT WITH THE PURPOSES OF THE NEW MELONES PROJECT AND EXEMPLIFY THE UNWORKABILITY OF PETITIONERS' CONSTRUCTION OF SECTION 8

Petitioners recognize that the States "may not interfere with specific, fundamental reclamation laws

and policies established by Congress" (Br. 14). They contend, however, that interpreting Section 8 to allow the States "to control federal water rights" to the extent exemplified by the conditions of Decision 1422 "removes any basis for a fear that national interests will be overridden by state interests" (Br. 17). These conditions, petitioners claim, "do not substantially affect the Bureau's plans to acquire and use water for the project, much less conflict with the congressionally-authorized purposes of the project" (Br. 67 n. 48), though they admittedly conflict with "a federal administrative decision" of the Bureau of Reclamation (Br. 68). The *amici* States similarly contend that allowing States to impose conditions such as those of Decision 1422 is sound public policy that accommodates both state and federal interests (Br. 16–18).

A review of the conditions imposed on the New Melones Project by Decision 1422 demonstrates the fallacy of these contentions. It shows that these conditions are in many ways inconsistent with federal policy decisions embodied in the project, and typically with congressional decisions as well as administrative ones. It shows that interpreting Section 8 to allow the States to impose such conditions on federal reclamation projects would not promote, but defeat, the accommodation of federal and state interests. It would allow the States unilaterally to upset the accommodation already reached through the extended process of

and holding in *Arizona* v. *California* (Br. 10–11), candidly asks the Court to "purge the error" of these decisions (*id.* at 12).

federal-state consultation and coordination that has taken place both before and after congressional authorization of the project. Finally, a review of these conditions shows how the comprehensive and integrated nature of a federal reclamation project leaves no room for any control by the States, of the kind these conditions seek to establish, over the construction or operation of the project or over the choices that must be made among the uses and purposes the project will serve.[36]

A. CONDITIONS PRECLUDING FULL IMPOUNDMENT OF THE RESERVOIR

The conditions in Decision 1422 that most seriously impair the project purposes are Conditions 1 and 2, which preclude full impoundment of the New Melones reservoir until the Bureau of Reclamation is able to persuade the state Board that such impoundment is desirable.

1. THE PROJECT PURPOSES

The reservoir capacity of the New Melones Project as originally authorized in the Flood Control Act of 1944 was 450,000 acre-feet, with a provision for possible enlargement to 1,100,000 acre feet (see Project Document, at 3). A primary purpose of the 1962 reauthorization was to expand the reservoir capacity to 2,400,000 acre feet. As stated in the project report

[36] The conditions imposed in Decision 1422 are not unique. Another example is provided by the conditions imposed by the California Board in Decision 1379, which are described in the brief of *amici* Friant Water Users Association, *et al.*

submitted to Congress by the Acting Chief of Engineers (Project Document, at 1):

> The District and Division Engineers find, after joint studies with the Bureau of Reclamation, that the New Melones Project, to provide a gross storage capacity of about 2,400,000 acre-feet and a hydroelectric development of approximately 150,000 kilowatts, is needed for full development and maximum utilization of the water resources of the Stanislaus River basin as well as to provide an adequate degree of flood protection on the Stanislaus and lower San Joaquin Rivers.

The State of California, in its comments submitted to Congress on the Project Report (App. A, *infra,* pp. 1A–27A), not only endorsed the reauthorization of the project basically as described in the Project Report (see *id.* at 25A–27A), but recognized and endorsed specifically the expansion of the reservoir to 2,400,000 acre-feet (see *id.* at 3A). Thus the State concluded (*id.* at 25A):

> 1. Optimum multipurpose development of the New Melones Reservoir site should be made for the purposes of flood control, water conservation, hydroelectric power, recreation, and fish and wildlife. Reservoir storage capacity of 2,400,000 acre-feet as planned in the report, is adequate for these purposes.

In the Flood Control Act of 1962 (76 Stat. 1180), Congress modified the New Melones Project and reauthorized it "substantially in accordance with the recommendations of the Chief of Engineers" in the

project report (76 Stat. 1191). The Act referred specifically to several of the Project's purposes, including irrigation, power, and recreation. Among other things, it directed that upon completion of the dam and powerplant, "the project shall become an integral part of the Central Valley project and be operated and maintained by the Secretary of the Interior pursuant to the Federal reclamation laws" (76 Stat. 1191); it directed the Secretary of the Interior to make "contracts for the sale and delivery of the additional electric energy available from the Central Valley project power system as a result of the construction of the plants herein authorized" (76 Stat. 1191–1192); and it directed the Secretary of the Army to "construct basic public recreation facilities [and] acquire land necessary for that purpose" (76 Stat. 1191).

The Act also provided that plans, specifications, and preliminary work for all projects authorized in the Act, including New Melones, could be funded with subsequent flood control appropriations "so as to be ready for rapid inauguration of a construction program." And it directed that all the projects "shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements." 76 Stat. 1180.

2. THE BOARD'S CONDITIONS

Conditions 1 and 2 imposed by the Board in Decision 1422 (A. II, 33–34) restrict the uses and limit the amounts of project water, prohibiting full impoundment of the reservoir until such time as the

Bureau persuades the Board that that impoundment is desirable.

Condition 1(a) deals with an application by the Bureau to appropriate water "for irrigation, domestic, municipal, industrial, fish culture, recreation and water quality control purposes" (A. II, 9). The Board grants the requested amount but only for the purposes of fish and wildlife, recreation, and water quality (A. II, 33)—banning use of this water, until further order of the Board, for the project purposes of irrigation and domestic, municipal, and industrial consumption, purposes that Congress sought to promote by providing that the New Melones Project would be fully integrated with the Central Valley Project.[37]

Conditions 1(b) and 1(c) (A. II, 33–34) allow the requested purpose, which is power generation, but substantially reduce the quantities of water that may be appropriated and hence the amount of power that can be generated (and funds returned to the government) by the project.[38]

Condition 1(d), like condition *1(a)*, deals with an application to appropriate water—to the full reservoir capacity of 2,400,000 acre feet annually—for the purposes of irrigation, domestic, municipal, and industrial consumption, fish, recreation, and water quality control (A. II, 9). It limits the permit to 1,420,000 acre feet and, like Condition 1(a), limits the permissible uses, until further order of the Board, to fish and wildlife, recreation, and water quality control (A. II, 34). Once again, purposes intended by Congress would not be permitted by the Board, while the intended quantity of unappropriated water would also be denied.

Condition 2 limits impoundment of the reservoir to only so much water as is necessary to provide releases of 98,000 acre-feet annually, which releases are limited to the purpose of preserving and enhancing fish and wildlife, plus such additional releases as are specified by Condition 5 for the purpose of maintaining water quality (A. II, 34) (see pp. 70–75, *infra*). The Condition provides: "No additional impoundment shall be allowed for power and recreational purposes" (*ibid.*). No impoundment for new irrigation is authorized, either.[39] Additional impoundment will be authorized only on "[f]urther order of the Board," which

> * * * shall be preceded by a showing that the benefits that will accrue from a specific proposed use will outweigh any damage that would result to fish, wildlife and recreation in the

[37] See the affidavit submitted to the district court by John R. Morgan, chief of the Bureau of Reclamation division responsible for planning the New Melones Project (A. II, 135, 136–137).

[38] *Condition 1(b)* reduces the quantity of water sought by more than 25 percent (compare A. II, 8–9, with A. II, 33). *Condition 1(c)* deals with an application to fill the reservoir—that is, appropriate 2,400,000 acre feet annually by storage—for power generation (A. II, 9). It limits the amount to 1,420,000 acre feet annually (A. II, 33–34).

[39] Condition 2 does permit impoundment to satisfy "prior rights at existing Melones Reservoir" (*ibid.*), including irrigation, and for flood control (A. II, 34).

watershed above New Melones Dam and that the permitee has firm commitments to deliver water for such other purposes. [A. II, 34.]

3. THE CONDITIONS VERSUS THE PURPOSES

These conditions reflect the Board's determination that the recreational uses of the proposed reservoir would not adequately substitute for the loss of white water rafting and stream fishing in the existing stretch of the river (A. II, 27–29; see p. 10, *supra*), and that the benefits of power production would not outweigh this loss (A. II, 27–28, 32; see pp. 11–12, *supra*). Although the Board found that production of power would be a "[b]eneficial use of project water" (*id.* at 32), and estimated the value of the power benefits of the proposed project as $5.5 million per year (A. II, 27), it concluded that:

> • • • preservation of the existing upstream reach of the river for recreation values conflicts with increased storage for power purposes. Therefore, storage for power generation should be approved, but limited to the amount authorized for other project purposes. [*Id.* at 32.]

These conditions are inconsistent with the project plan, as reauthorized by Congress after endorsement by California, for a reservoir of 2,400,000 acre feet. They are inconsistent with the project's purposes, specifically reflected in the 1962 Act, of providing irrigation, power, and new recreation facilities. In general, they interfere with the functions of the project—principally irrigation and power—that would

otherwise bring in revenues to offset the project costs. As one law review commentator has observed:

> If congressional authorization requires that the New Melones Dam be built as planned, then D 1422 cannot be enforced without destroying the economic feasibility of the project. There is no way that the irrigation and power purposes of New Melones can be achieved if the conditions of D 1422 remain unchanged. [40]

The State's unilateral restriction of the revenue-producing features of the Project warrants special note in view of the recent publication of an Interior Department audit of the Central Valley Project which concludes that the Project is "in serious financial trouble." [41]

Petitioners stress that Conditions 1 and 2 only "defer" full impoundment of the reservoir (Br. 7, 8, 10, 67). They assert that "[n]othing in federal law"—as distinguished from "a federal administrative decision" (Br. 68)—requires that project waters be fully, and immediately, impounded • • •" (Br. 68). The 1962 authorizing Act states, however, that New Melones and the other projects authorized "shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements" (76 Stat. 1180). Conditions 1 and 2 impair this congressional purpose in two ways. They delay the ex-

[40] Comment, *Allocation of Water from Federal Reclamation Projects: Can the States Decide?* 4 Ecology L.Q. 343, 373 (1974).

[41] United States Department of the Interior, Office of Audit and Investigation, *Review of the Central Valley Project, Bureau of Reclamation* (January 1978).

peditious realization of the project that Congress directed, and at the same time they aggravate the "budgetary requirements" by preventing the completed project from generating its full complement of revenues.

Moreover, Condition 2 subjects every future Bureau request to impound additional water to the same discretionary jurisdiction and balancing test of the Board."[42] The Board can continue to determine that the damage to fish, wildlife, and particular forms of recreation outweighs the benefits of proposed project uses (including irrigation), even in cases where the Board finds that the Bureau has "firm commitments" to deliver project water for those uses (see A. II, 34). It would be the state Board's view of "the public interest" that determined whether purposes for which Congress had authorized and the federal government had constructed this project, with the approval of California, would be allowed to go forward. Such conditions are inconsistent, not only with the congressionally authorized purposes of the New Melones Project, but with its very nature as a project funded, constructed, and operated by the federal government."[43]

[42] "[T]he specific intended use must be evaluated and found to be reasonable, beneficial and *in the public interest* before a permit can issue. The Board undertakes a balancing of competing demands and policy considerations and has broad discretion." Decision 1422, A. II, 21 (emphasis in original).

[43] Petitioners rely (Br. 10 and n. 12) on a statement from the United States' Brief in Opposition filed in April 1974 in *Environmental Defense Fund, Inc.* v. *Armstrong*, 487 F. 2d 814 (C.A. 9), certiorari denied *sub nom. Environmental Defense Fund, Inc.* v. *Stamm*, 416 U.S. 974 (No. 73-1179), stating that Decision 1422

B. CONDITIONS LIMITING OR CONTROLLING THE USE OF PROJECT WATER

1. CONDITIONS 4 AND 25

(a) *The conditions. Condition 4* (A. II, 35) provides that project water may be used for consumptive purposes only in four named counties (Stanislaus, Calaveras, Tuolumne and San Joaquin). It further states that the Board will consider amending the permits to authorize consumptive use elsewhere only on a showing "that water from other [Central Valley

"does not render the project useless or fundamentally alter its value." *Armstrong* was a suit challenging the adequacy of the Bureau's environmental impact statement for the New Melones project. Our primary submission in the Brief in Opposition was that the courts below had correctly found the statement adequate. We also argued that the trial court had not erred in deferring consideration of the effect of Decision 1422 pending the outcome of this litigation challenging that decision, and it was in connection with this argument that the quoted statement was made. We urged that Decision 1422 was "not relevant" to *Armstrong*, first, because we were challenging the Decision as invalid, and second, because the Decision "does not render the project useless or fundamentally alter its value" (Br. 10).

After closer review of Decision 1422 in this case, we no longer believe it is correct to say that the Decision does not "fundamentally alter" the value of the New Melones project, although imposition of the conditions set forth in the Decision would not render the project "useless." Similar judgments have been expressed by federal officials concerned with the project since 1974, subsequent to the filing of the Brief in Opposition in *Armstrong*. See the letter dated August 29, 1974, from the Commissioner of Reclamation to the Governor of California, stating that the restrictions imposed in Decision 1422 "seriously impair the authorized project purposes" (A. II, 132); the affidavit of John R. Morgan dated October 11, 1974 (A. II, 135, 136); and the affidavit of J. Robert Hammond dated October 11, 1974 (A. II, 146).

Project] sources is not available to serve such areas," and that any such use that may later be authorized outside the four counties "shall be subordinate" to use within those counties and "shall terminate" when the water is needed within those counties (*ibid.*). *Condition 25* (A. II, 40) prohibits the use of project water "outside the counties of origin" if the water "is necessary for the development of [those] counties." (The "counties of origin" referred to in Condition 25 are apparently the same four counties for which a preference is required by Condition 4. See Pet. Br. 6 n. 5.)

(b) *The project purposes.* The 1962 authorizing Act directs that the New Melones project "shall become an integral part of the Central Valley project and be operated and maintained by the Secretary of the Interior pursuant to the Federal reclamation laws," with the proviso that "before initiating any diversions of water from the Stanislaus River Basin in connection with the operation of the Central Valley project, the Secretary of the Interior shall determine the quantity of water required to satisfy all existing and anticipated future needs within that basin and the diversions shall at all times be subordinate to the quantities so determined" (76 Stat. 1191). Petitioners contend (Br. 6 and n. 5) that Conditions 4 and 25 "echo" this proviso of the Act.

(c) *The conditions versus the purposes.* Conditions 4 and 25 are not consistent with the Act. Under Condition 4, even if the water needs of the Board's four

preferred counties were determined to be met, consumptive use of project water outside those counties still would not be authorized by the Board unless it was shown "that water from other CVP sources is not available to serve such areas" (A. II, 35). This stipulation not only has no counterpart in the Act, but it countermands the Act's directive that the New Melones Project become an integral part of the Central Valley Project and be operated by the Secretary of the Interior to fulfill the purposes of the federal reclamation laws. Those purposes include meeting agricultural, municipal, and industrial needs within the service areas of the Central Valley Project, after the needs of the Stanislaus River Basin have been met in accordance with the Act's proviso.

Nor do these conditions "echo" that proviso. The proviso requires the Secretary of the Interior—not the state Board—to "determine the quantity of water required to satisfy all existing and anticipated future needs" of the "Stanislaus River Basin" (76 Stat. 1191). Condition 4 would have the state Board determine whether the water is needed for "beneficial use" within the four counties. And Condition 25 would condition any use of the water outside those counties on the even broader determination, also to be made by the state Board, of whether the water is "necessary for the development of the counties." The conditions thus would give the state Board the operating and allocative control over project water which

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the authorizing Act places in the Secretary of the Interior."

2. CONDITIONS 5 AND 20

[A] CONDITION 5 AND THE BUREAU'S WATER-QUALITY AGREEMENT

Condition 5 (A. II, 35–36) also limits the use of project water, subjecting that use to state standards of water quality control. Condition 5 requires that releases of water from the New Melones Reservoir for purposes of water quality control be scheduled so as to preserve a mean monthly concentration of dissolved solids of not more than 500 parts per million at a point in the San Joaquin River, and a dissolved oxygen concentration in the Stanislaus River as specified in the state Board's interim water quality control plan (A. II, 35). It further provides that if the interim plan is amended or superseded, "the foregoing water quality objectives shall be modified to conform to then current criteria" (*id.* at 35–36).

The 1962 authorizing Act provides that the Secretary of the Army is to consider "the advisability of including storage for the regulation of streamflow for the purpose of downstream water quality control" (76 Stat. 1192). Pursuant to this provision, cooperative studies of water quality requirements in the Stanislaus River were undertaken by the Public Health Service, the Bureau of Reclamation, and the Corps of Engineers, "demonstrating the feasibility of adding water quality control as a function of the New Melones Project" (A. II, 149). As a result, in 1969 an agreement was reached, and a "Memorandum of Agreement" signed, between the Bureau and the Central Valley Regional Water Quality Control Board, concerning the water quality functions and standards for the New Melones Project (A. II, 148–151).[45] It is this agreement to which petitioners refer when they state that Condition 5 "reaffirm[s] [the Bureau's] contractual obligations" arising from "an agreement between the Bureau and California agencies" (Br. 6 and n. 6; see also *id.* at 67, n. 48).

In fact, the obligations imposed on the Bureau by Condition 5 are not those of the agreement but

"Moreover, contrary to petitioners' implication (Br. 6, n. 5), the "Stanislaus River Basin," whose water needs are given preference by the Act, is not necessarily coterminous with the four counties that are named in Condition 4 and that reappear as the "counties of origin" in Condition 25. See A. II, 143 (Morgan affidavit). See also the Board's own statement (A. II, 21) that "[t]hese four counties include substantial areas in the Stanislaus River basin * * *." The Stanislaus River Basin is not defined in the 1962 Act or its legislative history (including the Project Document), and the Secretary of the Interior is now considering recommendations, formulated after a series of public hearings held in Stanislaus, Calaveras, Tuolumne and San Joaquin counties between December 15 and December 19, 1975, concerning the proper definition of the basin. The Secretary must define the basin in order to proceed with his task of determining the existing and future water needs "within that basin" (76 Stat. 1191), after which he is directed by the Act to use the remaining water in such a way as best to meet the needs of the integrated Central Valley Project (*ibid.*). Conditions 4 and 25 would supplant such determinations by the Secretary with different determinations by the state Board. Cf. the "county of origin" claim that was rejected in *City of Fresno* v. *California*, 372 U.S. 627; see pp. 45–46, *supra*.

[45] The proposed water quality releases were also reported to Congress in conformity with the authorizing Act (A. II, 139, 140 (Morgan affidavit)).

reflect a one-sided rewriting of the agreement by the state Board. While the agreement did state the total-dissolved-solids concentration of not more than 500 parts per million as an "objective" of the Bureau's water-quality releases from New Melones (A. II, 150), the agreement included two basic limitations on the water-quality obligations that the Bureau was assuming. First, it limited to 70,000 acre-feet per year the amount of water the Bureau agreed to release from the New Melones Dam for the purpose of water quality control (A. II, 150). Second, it provided that "if hydrologic or other conditions prevent maintenance" of the specified total-dissolved-solids concentration "on a mean monthly basis during the entire year," then "operational releases of the water quality reservation will be restricted to the irrigation season in accordance with irrigationists' needs" (A. II, 150).

The Board in Decision 1422 discussed these terms of the agreement and rejected them (A. II, 17–19). Stating that "the ability of the agreed-upon releases to accomplish the water quality objectives depends upon [certain assumptions]," that "[t]hese assumptions may not be valid," and that "[t]here was considerable evidence presented at the hearing as to what are proper water quality objectives" (A. II, 18), the Board disapproved the limitations that the agreement imposed on the amounts of water that the Bureau agreed to release from New Melones for water-quality purposes. Instead of adopting the agreement,[46]

[46] Compare the Board's Condition 24 (A. II, 40), making the permits subject to other agreements between the Bureau and California agencies.

the Board decided that "any permits issued pursuant to [the Bureau's] applications should contain an interim term until further studies are made requiring releases of conserved water from New Melones which will maintain [certain concentrations of solids and oxygen] * * * as specified in the Interim Water Quality Control Plan. The Board should reserve jurisdiction over the permits for the purposes of revising water release requirements for water quality objectives." A. II, 19; accord, Condition 5, A. II, 35–36."

By Condition 5 the Board would thus impose on the project water-quality obligations which, far from representing an accommodation of state and federal interests, repudiate the contract reached and signed on this subject by the Bureau and the State's regional water quality control board. The Board adopts one of the "obligations" that the Bureau agreed to in that contract but rejects the limitations on that obligation embodied in the same contract. Those limitations, moreover, were important to the project. Without such limitations on the amounts of water that must be re-

[47] Petitioners state that Condition 5 "reaffirm[s] contractual obligations voluntarily incurred by the Bureau" (Br. 67 n. 48; see also Br. 6 and n. 6). Petitioners neglect to state that it does so while dropping the conditions that limited those "obligations" in the contract. Without those conditions, the Board would not have "voluntarily incurred" the obligations. In addition, whatever obligations the Bureau had under the contract were fixed. There was nothing in the contract (see A. II, 148–151) resembling the provision in Condition 5 tying the Bureau's obligations to future changes in the Board's interim water quality control plan (A. II, 35–36), or resembling the even more open-ended provision of Condition 20 (A. II, 39; see pp. 74–75; *infra*).

leased for water quality purposes, required releases for this purpose could prevent the project from adequately serving its various other purposes (such as irrigation, to which one of the limitations in the agreement was expressly tied (A. II, 150)). Indeed, Condition 5 would permit taking up to the full yield of New Melones for water-quality purposes if the Board determined that this was appropriate (A. II, 35–36; see A. II, 139 (Morgan affidavit)).

(B) CONDITION 20

Condition 20 (A. II, 39) complements and expands on Condition 5. It reserves to the Board authority to modify the quantity of water diverted by the Project if "the Board finds that such modification is necessary to meet water quality objectives in water quality control plans which have been or hereafter may be established or modified" under state law (A. II, 39). This open-ended condition would permit the Board, on the basis of any water quality control plan that might subsequently be established,[48] to determine that any portion of the yield of the New Melones Project—up to and including the total amount—must be used for water quality purposes. "With such po-

[48] The Board itself has jurisdiction to formulate and adopt state policy for water quality control (California Water Code § 13140 West 1971), to approve water quality control plans adopted by regional boards (*id.* at § 13245 (1977 Cum. Supp.)), and to adopt its own water quality control plans (*id.* at § 13170 (1977 Cum. Supp.)) for waters for which water quality standards are required by the Federal Water Pollution Control Act (86 Stat. 816, 33 U.S.C. 1251 *et seq.*).

tential for a required operational change, the Bureau could not effectively plan nor control the operation of the project" (A. II, 145 (Morgan affidavit)). The required use for water quality could override the project's commitments to meet other needs and purposes for which it was authorized by Congress (including the need for financial integrity), and could override the contrary decisions made by the Secretary pursuant to the authority delegated to him by the Congress.

It bears emphasis that the Secretary here has entered into a specific, formal agreement with a state agency, the Central Valley Regional Water Quality Control Board, concerning the water quality functions of this federal project (A. II, 148–151). Yet the state Board, by Decision 1422 and the attached conditions, would override that agreement and unilaterally impose its own, more stringent water-quality requirements on the project, reserving jurisdiction to make those requirements even stricter. These circumstances illustrate the difference between the state-federal coordination that is actually involved in the reclamation program and the nature of the power that petitioners claim here.

C. CONDITIONS RESERVING THE BOARD'S JURISDICTION OVER THE OPERATION OF THE PROJECT

A number of other conditions reserve to the state Board continuing jurisdiction to restrict the project's impoundment of water, alter release requirements, and otherwise control the project's operation.

1. CONDITION 9: FUTURE CHANGES IN AMOUNTS OF WATER

Condition 9 (A. II, 36) says simply: "The maximum quantities stated herein may be reduced in the license if investigation warrants" (A. II, 36). It thereby leaves to the Board's discretion the amount of water that may be stored and used in the future to fulfill the purposes of the project.

2. CONDITION 13: AUTHORITY OVER OPERATING METHODS

Condition 13 (A. II, 37) reserves authority in the Board to regulate matters such as "method of diversion, method of use, and quantity of water diverted," so as "in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water." The exercise of this authority by the Board, and in particular the adoption of measures such as those specifically suggested in Condition 13,[*] would go far toward establishing that it was the Board, not the Bureau, that was operating and maintaining the project (and requiring expenditures to be made for it). The

[*] The condition states (A. II, 37) that in order to meet the quoted objectives, the Bureau "may be required to implement such programs as (1) reusing or reclaiming the water allocated; (2) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (3) suppressing evaporation losses from water surfaces; (4) controlling phreatophytic growth; and (5) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirements for the authorized project."

1962 authorizing Act states, in contrast, that except for the flood control aspects (which are subject to rules and regulations prescribed by the Secretary of the Army), the project was to be "operated and maintained by the Secretary of the Interior pursuant to the Federal reclamation laws" (76 Stat. 1191).

3. CONDITION 6 AND "FISH RELEASES"

Condition 6 (A. II, 36) reserves jurisdiction for the purposes of establishing "dry year criteria" and of "revising water release requirements for water quality objectives and fish releases," pursuant to further studies. The question of water quality releases has already been discussed in connection with Condition 5 (pp. 70–74, *supra*).

So far as "fish releases" are concerned, they are purportedly regulated not only by Condition 6 but by *Condition 2* (A. II, 34), which specifies the amount of water that may be impounded for fish and wildlife purposes and states that this water is "to be released at a rate specified by the California Department of Fish and Game" (A. II, 34).

The 1962 Act directed the Secretary of the Army, not the state Board, to "adopt appropriate measures to insure the preservation and propagation of fish and wildlife in the New Melones project • • •" (76 Stat. 1191). There was extensive consultation and agreement between federal and state officials on the subject of fish and wildlife, and fish releases in par-

ticular. The California Department of Fish and Game submitted to Congress extensive comments on the project report (App. A, *infra*, pp. 17A–23A), and the Corps of Engineers stated in response that it had agreed to recommendations of the Fish and Wildlife Service for downstream fish releases which were consistent with the recommendations of the California Department (Project Document, at xxxiv)."[80]

In general, if the state Board has the authority asserted in Condition 6 to regulate water releases for selected purposes, all the purposes of the project that are dependent on water are affected, and there is no way for federal authorities to assure that those purposes are realized as Congress intended (see A. II, 143 (Morgan affidavit)). Again, the result is to transfer operating control of the project from the federal government to the state Board.

D. CONDITIONS AFFECTING CONSTRUCTION AND DESIGN OF THE PROJECT

The 1962 authorizing Act authorizes the Corps of Engineers to construct the New Melones Project, substantially in accordance with the plans set forth in the Project Document (76 Stat. 1191). Yet a number of the conditions attached to Decision 1422 would extend

[80] See also the affidavit of Bureau official John R. Morgan, stating: "The project fish releases were previously studied and agreed upon by the State Department of Fish and Game, the U.S. Bureau of Sport Fisheries and Wildlife, and the Bureau of Reclamation" (A. II, 140).

the control of the state Board to the construction and design of the project.

Conditions 10 and 11 set construction deadlines, as if the state Board were financing and building the project: "Construction work shall be completed on or before December 1, 1980" (Condition 10), and "Complete application of water to the uses authorized by the permit shall be made on or before December 1, 1990" (Condition 11) (A. II, 36).

Condition 17 requires that the Bureau "install and maintain an outlet pipe of adequate capacity in [the] dam as near as practicable to the bottom of the natural stream channel, or provide other means satisfactory to the [Board], in order that water entering the reservoir which is not authorized for appropriation under this permit may be released" (A. II, 38).

This additional outlet pipe is not included in the project designs and would be structurally inconsistent with the project's proposed method for releasing stored water, thereby imposing "considerable additional costs and operational constraints on the project," as pointed out in the affidavit of Bureau official John Morgan (A. II, 144). Petitioners justify this condition as requiring the Bureau "to provide means for the release of excess waters" (Br. 7 n. 9). But what the condition requires is a particular, structural "means" specified by the Board, or some "other means satisfactory to the [Board]" (see A. II, 142 (Morgan affidavit)).

Condition 18 requires the Bureau to "clear the site of the reservoir of all structures, trees, and other vegetation" that would interfere with storage or recreation, except for "vegetation cover in selected areas as required for the protection of wildlife" (A. II, 38). It also requires that clearing operations "be coordinated with authorized increases in storage levels" (*ibid.*). Together with *Condition 3*, which requires the Bureau to file with the Board a "proposed reservoir clearing plan" (A. II, 35), Condition 18 appears to require a staged clearing process, which would be contrary to the plan developed by the Corps of Engineers for "overall clearing" during project construction (see A. II, 138, 143 (Morgan affidavit)).

E. CONDITIONS IMPOSING REPORTING REQUIREMENTS

Other permit conditions impose on the Bureau extensive reporting requirements that are apparently designed to enable the Board to exercise continuing control over the project. These conditions require the Bureau to keep numerous records and prepare a variety of reports, none of them authorized by Congress and none of them carrying congressional appropriations—not to mention State appropriations—to pay for them (see A. II, 140).[51]

[51] The required reports include: (1) "a reservoir operation study showing the water level elevations required to provide [specified] yield," including details of the "proposed reservoir clearing plan," and a "reservoir operation schedule" which "shall be subject to approval of the Board" (*Condition 3*, *id.* at 34–35); (2) biennial reports of water diversions and use showing "which diversions may be encroaching on the water supply provided for preservation and enhancement of fish and wildlife and for water quality control," as well as "what steps, if any, permittee is taking to prevent any such encroachment" (*Condition 7*, *id.* at 36); (3) an annual report showing the daily storage level in the reservoir and the daily water quality (*Condition 8*, *ibid.*); (4) "[p]rogress reports" to be submitted "when requested by the State Water Resources Control Board until [a] license is issued" (*Condition 12*, *ibid.*).

In addition, *Condition 22* (A. II, 39) provides that "[b]efore making any change in the project determined by the [Board] to be substantial, [the Bureau] shall submit such change to the Board for its approval * * *."

This condition purports to place in the state Board the authority to approve, and hence control, any of the many changes that might be called "substantial" which are inevitable in the course of the planning, construction, implementation, and operation of such a large project. The power to control "substantial changes" in such a project is the power to control the project, a power that Congress gave in the 1962 Act not to the state Board but to the Secretary of the Army and the Secretary of the Interior. Moreover, truly substantial changes in the project must be approved by Congress (see 76 Stat. 1180, 1191). With respect to these changes the Board's requirement would not only create duplication and confusion, but would bypass the established processes for state input into congressional authorization decisions on reclamation projects.

F. CONDITIONS REQUIRING ACCESS TO THE PROJECT

Finally, two conditions require the Bureau to provide certain persons with access to the project.

Condition 15 requires the Bureau to allow representatives of the Board, "and other parties, as may be authorized from time to time by said Board," reasonable access to the project works to determine compliance with the permit conditions (A. II, 37–38).

As pointed out in the affidavit of Bureau official Morgan (A. II, 142), this condition not only "has the effect of again placing the project operation under the Board's control rather than under the Secretary of the Interior in accordance with the authorization," but it would also "compromise the Secretary's responsibility for the security of Federal works."

Condition 16 (A. II, 38) requires the Bureau to allow the public "reasonable right of access to the waters impounded by the dam * * * for the taking of fish subject to the regulations of the [State] Fish and Game Commission." If this provision vests in the Board the authority to determine whether access provided by the Bureau is "reasonable," it again trenches on the authority to operate and maintain the project which Congress gave to the Secretary of the Interior.

G. CONCLUSION

The foregoing review of the conditions attached to Decision 1422 has necessarily been extensive because the conditions are. Examined either individually or

in their cumulative impact, the conditions contradict petitioners' claim that they are "fully consistent with the congressionally-authorized purposes of the project" and that, with the admitted exception of the ban on fully impounding the reservoir, they "do not substantially affect the Bureau's plans to acquire and use water for the project" (Br. 67 and n. 48; see *id.* at 67–68).

With respect to "the congressionally-authorized purposes of the project," the conditions are inconsistent with the provisions of the 1962 Act that New Melones shall become an integral part of the Central Valley Project and serve the needs of that project (except to the extent that the Secretary of the Interior determines that the water is required for the existing and future needs of the "Stanislaus River Basin") (76 Stat. 1191). Specifically, by limiting the project's power output, the conditions undermine the Act's provision for "the sale and delivery of the additional electric energy available from the Central Valley project power system as a result of the construction of the plants herein authorized and their integration with that system" (76 Stat. 1191–1192).

The conditions interfere with the Act's directives to the Secretary of the Army to adopt measures for fish and wildlife preservation and construction of public recreation facilities and to consider providing for downstream water quality control (76 Stat. 1191, 1192). They are inconsistent with the decisions of Congress, stated in the Act, that the project shall be

constructed by the Corps of Engineers and then "operated and maintained by the Secretary of the Interior" (76 Stat. 1191).

By prohibiting full impoundment of the reservoir until the Board approves, the conditions flout the congressional directive that the project "be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements" (76 Stat. 1180).

In addition, the conditions are inconsistent with various decisions made by the Secretary of the Army and the Secretary of the Interior pursuant to the authority Congress granted them to construct and operate the project. Petitioners admit that the conditions conflict with the Bureau's decision to fully impound the reservoir in accordance with the Project Document, but find it permissible that "state law conflicts only with a federal administrative decision" (Br. 68). Petitioners cite no authority for this proposition, and there is none. Since the Bureau's decision to fully impound the reservoir has been made pursuant to the authority granted it by Congress, an inconsistent decision of a state administrative Board—or even of a state legislature, if that were the case—must give way to the supremacy of federal law. See, *e.g., Free* v. *Bland,* 369 U.S. 663, 668.

The decisions shaping the New Melones Project that the state Board seeks to undo were not only made by Congress and the authorized federal agencies; they were also made by the State of California, through its participation in the planning of the proj-

ect both before and after the 1962 authorizing Act. California endorsed the project report on which the authorization was based (see App. A, *infra,* pp. 1A–27A), and there has been extensive federal-state coordination since 1962 on specifics of the project. The state Board now seeks, unilaterally, to redesign the operations of the project. This attempt is shown most clearly by the matter of water quality control, where Decision 1422 would repudiate and rewrite an agreement negotiated and signed between the federal Bureau and a state regional water quality control board (A. II, 148–151).

There is a final conclusion to be drawn from reviewing the conditions of Decision 1422. We have examined most of the conditions individually to show how each is inconsistent with the federal purposes of this project. But the very process of individual examination, through its laboriousness, its necessary descent to the level of operational detail, and its need to specify project purposes out of a massive process of planning and authorization, demonstrates that such a comparison of federal and state specifications for a complex reclamation project is not an appropriate task to be imposed on the courts and undertaken as a matter of law.[52]

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[52] Such is the task proposed by Dean Meyers as *amicus* (Br. 12–15). Its nature is suggested by petitioners' statement (Br. 40 n. 30): "We do not assert the right, of course, to 'dictate' the daily operation of a project or changes in authorized uses, except to the extent related to the 'beneficial' and 'reasonable' use of water and not inconsistent with specific federal reclamation laws or congressionally-authorized project purposes."

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The district court recognized as much by declining to consider whether the conditions of Decision 1422 "do in fact alter or conflict with the purposes of the New Melones Project" (A. I, 93). The court held that such an inquiry was "not material," because the state Board simply lacked authority "in regard to the construction and operation of federal reclamation projects," except with respect to the determination of the availability of unappropriated water (*ibid.*).

Both the comprehensiveness and the detail of the federal involvement in a project of this kind, and the corresponding breadth and depth of a judicial inquiry into the consistency or inconsistency of attempted state involvement, compel the conclusion that federal authority has occupied the field with respect to the project's planning and operation. There are established modes of state participation, but there is no room for unilateral state control of the kind asserted in Decision 1422.

III

FEDERAL LEGISLATION LEAVES NO ROOM FOR STATE CONTROLS OVER THE OPERATION OF FEDERAL RECLAMATION PROJECTS OR THE ALLOCATION OF THEIR WATERS AMONG COMPETING USES

Petitioners recognize that "where Congress has acted, the states cannot act differently" (Br. 59). They recognize that the States must defer to "the specific laws and policies established by Congress, including the purposes of its individual projects" (Br. 59). But petitioners would require these laws and

policies to be "specific" indeed. And they would require Congress itself, in the text of legislation, to set forth the specifics.

"If Congress provides that a project shall impound a specific quantity of water," a State cannot require otherwise, petitioners acknowledge (Br. 59). But Congress may not achieve this result, in their view, by approving a project report that "describes the amount of water to be impounded by the project" (Br. 60 n. 44) and delegating to the Secretary of the Interior the authority to operate and maintain the project (76 Stat. 1191). For the specific decision on when to impound the water would then be made by "a federal agency that is answerable to no one except, in an abstract sense, to Congress" (Br. 61).[53] The contrary decision of the state Board should prevail (Br. 68).

Similarly, even though Congress does state in an authorizing Act that one of the purposes of a project is power generation—as it stated with respect to the New Melones Project (76 Stat. 1191–1192; Br. 60 n. 44)—a decision of the state Board substantially reducing the amount of power that the project can generate (see pp. 61–66, *supra*) does not "impair those purposes" (Br. 59).

There are a number of reasons why petitioners' theory should be rejected by the Court.[54] Two have

[53] While petitioners distinguish sharply between Congress and a federal administrative agency, they equate the permit conditions imposed by the state Board with "the states' appropriation laws" (Br. 58).

[54] Many of the reasons noted here, as well as others, are admirably presented in the *amicus curiae* brief of the Pyramid Lake Paiute Tribe of Indians, at 6–31.

already been noted. However attractive the theory might sound in its abstract presentation, the 25 conditions imposed by Decision 1422 demonstrate, as we have shown at length in Part II (pp. 57–86, *supra*), that the control being asserted by the state Board in this case is not consistent with the congressional purposes of the New Melones Project. Second, petitioners' "suggested approach" (Br. 63) conflicts with this Court's interpretations of Section 8 in the *Arizona* v. *California,*[55] *City of Fresno,*[56] and *Ivanhoe*[57] decisions. If the approach nonetheless "results in a sound policy of water management," as petitioners contend (Br. 63),[58] that policy is for Congress to adopt.

In the following pages we will discuss three other reasons why there is no room, under existing law, for the kind of state controls over federal reclamation projects that petitioners would establish. First, Congress has occupied the field by expressing, both in the 1902 Reclamation Act and in a long line of succeeding statutes applicable to federal reclamation projects, a broad variety of substantive and procedural policies and administrative delegations that preclude a unilateral and mandatory state intervention. Second, there already exists, by virtue both of congressional legislation and of long-established practice, a

[55] 373 U.S. 546, 586–587; see pp. 47–50, *supra.*
[56] 372 U.S. 627; see pp. 45–46, *supra.*
[57] 357 U.S. 275, 291–292; see pp. 41–45, *supra.*
[58] See also the brief of Dean Meyers as *amicus* at 13–14.

powerful voice for the States with respect to the planning, construction, and operation of reclamation projects. If the existing modes of state participation should be replaced with the kind of unilateral power that petitioners contend for, that is a change in the legislative scheme that is for Congress to consider. Third, Congress has expressed a particular desire for federal reclamation projects to be subject to unitary management and has committed that management to the Secretary of the Interior. This commitment likewise precludes the unilateral control that petitioners would establish on behalf of the State.

A. CONGRESS IN A SERIES OF ENACTMENTS HAS MADE FEDERAL RECLAMATION PROJECTS SUBJECT TO A VARIETY OF FEDERAL POLICIES THAT LEAVE NO ROOM FOR STATE CONTROLS ON THE OPERATION OF A PROJECT OR ON THE CHOICE OF USES IT WILL SERVE

Petitioners assert that "the Bureau should be required to comply with the states' appropriation laws, including their permit systems, to the extent that such laws are not inconsistent with the specific reclamation laws and policies adopted by Congress" (Br. 58). Congress has, however, adopted such a comprehensive set of reclamation laws and policies that it has left no room for imposition of mandatory state controls or conditions. This conclusion flows from a review of the 1902 Reclamation Act and the line of subsequent congressional enactments, both reclamation laws and broader statutes, that govern federal reclamation projects.

1. RECLAMATION PROJECTS ARE PECULIARLY FEDERAL IN THEIR ORIGIN AND THEIR INTERSTATE ASPECTS

At the outset, two generic aspects of federal reclamation projects stand against the notion of state control. First, the question here is not whether state law is preempted by a federal regulatory scheme, as in *City of Burbank* v. *Lockheed Air Terminal,* 411 U.S. 624. Reclamation projects are direct federal undertakings, financed, constructed, owned, and operated by the federal government. See *Arizona* v. *California, supra,* 373 U.S. at 589. Traditionally, federal installations and facilities are " 'free from regulation by any state.' " *Hancock* v. *Train, supra,* 426 U.S. at 178 (quoting *Mayo* v. *United States,* 319 U.S. 441, 445).

Even where a water project is only licensed by the federal government, a requirement that it secure a state permit as a condition of operation has been struck down because it "easily could destroy the effectiveness of the Federal Act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government." *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission, supra,* 328 U.S. at 164; accord, *Federal Power Commission* v. *Oregon,* 349 U.S. 435, 445.

Second, federal reclamation projects often involve interstate streams. If States may unilaterally impose conditions on the storage or use of waters from the project, *which* State's conditions shall govern? The

problem of interstate incongruities was cited to the 1902 Congress as an important reason for a national approach to reclamation.[59] In *Arizona* v. *California, supra,* this Court noted that "[s]ubjecting the Secretary to the varying, possibly inconsistent, commands of the different state legislatures could frustrate efficient operation of the project and thwart full realization of the benefits Congress intended this national project to bestow" (373 U.S. at 590).

To be sure, petitioners note that this case involves "intrastate waters" (Br. 62). But Section 8 cannot be interpreted one way in such a case and differently when "interstate waters" are involved.[60]

2. THE RECLAMATION ACT OF 1902

The train of legislation infusing a variety of congressional policies into the reclamation program begins with the 1902 Act itself. Reading that Act as a whole,[61] one sees that it delegated to the Secretary of the Interior broad and comprehensive authority to

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[59] See the statement of Congressman Mondell, 35 Cong. Rec. 6676, quoted by the district court at A. I, 58–59, and the statement of Congressman Newlands, 35 Cong. Rec. 6734, quoted by the district court at A. I, 62–63.

[60] See *Environmental Defense Fund* v. *East Bay Municipal Utility District,* 142 Cal. Reptr. 904, 910. Petitioners claim that "the state in which the use occurs" has the greatest interest at stake (Br. 62). But the use of reclamation waters may take place at quite a distance, and across state lines, from where the waters originally flow.

[61] See *Richards* v. *United States,* 369 U.S. 1, 11; *Chemehuevi Tribe of Indians* v. *Federal Power Commission,* 420 U.S. 395, 403.

carry out the reclamation program. Section 10 of the Act, 32 Stat. 390, provided:

> * * * [T]he Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.

Section 6 of the Act, 32 Stat. 389, provided that "the title to and the management and operation of the reservoirs and the works * * * shall remain in the Government until otherwise provided by Congress." Section 2 of the Act, 32 Stat. 388, authorized the Secretary, without further action by Congress, to make examinations and surveys and to locate and construct irrigation works for the storage, diversion, and development of waters. Section 7 of the Act, 32 Stat. 389–390, authorized the Secretary to acquire necessary rights or property by purchase or condemnation. He was limited only by the requirement in Section 4, 32 Stat. 389, that he first determine that a particular irrigation project was "practicable." [62]

So far as the 1902 Act is concerned, then, the question posed by this case is whether the actual operation

[62] In 1910 Congress provided, however, that no irrigation project could be begun until it was approved by the President. Act of June 25, 1910, 36 Stat. 836. See pp. 104–109, *infra*, for a discussion of the current authorization procedures. Beginning July 1, 1966 specific authorization was required before the Secretary of the Interior could prepare a feasibility report for a reclamation water project. Section 8, Water Project Recreation Act of 1965, 16 U.S.C. 460*l*–19.

of reclamation projects is within the Secretary's authority under Sections 10, 7, 6 and 2 of the Act, or is subject to provisions of state law under Section 8.

3. RECLAMATION LEGISLATION FOLLOWING THE 1902 ACT

In a series of amendments to the 1902 Act, Congress expanded the authority of federal administrative officials and established an expanding list of substantive policies to guide the exercise of this authority. Many of these statutes were enacted over the objections of Western legislators, who contended that the authority granted should be left to the States.[63]

The first significant amendment to the 1902 Act was the Warren Act of 1911, 36 Stat. 925, 43 U.S.C. 523 *et seq.*, which authorized the Secretary of the Interior to contract for the use of surplus waters and for the construction of surplus reservoir capacity in connection with reclamation projects. Section 1 of the Act gave the Secretary power to contract for the delivery of surplus water "upon such terms as he may determine to be just and equitable" and to fix "just and equitable" charges. 43 U.S.C. 523.[64]

[63] Much of the following discussion is based on Sax, *Problems of Federalism in Reclamation Law*, 37 Colo. L. Rev. 49 (1964).

[64] The bill was opposed on the grounds that it would "transfer the jurisdiction now exercised by the State under its laws * * * to the Interior Department," and that it was "an attempt to weld together the Reclamation Service as the master of all the water users in the State." 45 Cong. Rec. 3740, 3744 (1910) (Senator Heyburn). In response, the bill was amended, 45 Cong. Rec. 4316 (1910), by adding the proviso (Section 2, 43 U.S.C. 524): "[t]hat nothing contained in this Act shall be held or construed as

In 1914 Congress passed the Reclamation Extension Act, 38 Stat. 686.[65] Section 8 of this Act, 38 Stat. 688, 43 U.S.C. 440, authorized the Secretary:

> to make general rules and regulations governing the use of water in the irrigation of the lands within any project, and [to] require the reclamation for agricultural purposes and the cultivation of one-fourth the irrigable area under each water-right application or entry within three full irrigation seasons * * * and the cultivation of one-half the irrigable area within five full irrigation seasons * * *.

As one commentator has noted, this provision was significant because it thrust the Secretary "into an area of water law that had traditionally been a matter of state concern—control over the laws dealing with due diligence, relation back and loss of water rights." Sax, *Problems of Federalism in Reclamation Law*, 37 Colo. L. Rev. 49, 72 (1964).

The next major amendment to the reclamation laws was the Act of February 25, 1920, 41 Stat. 451, 43 U.S.C. 521. This Act authorized the supplying of project water for purposes other than irrigation, and again

enlarging or attempting to enlarge the right of the United States, under existing law, to control the waters of any stream in any State." The debates reflect an understanding that this proviso failed to satisfy completely the objections to the bill, since it tacitly recognized existing federal authority. See 46 Cong. Rec. 2783 (1911) (Congressman Taylor); 45 Cong. Rec. 4319 (1910) (Senator Heyburn).

[65] Section 9 of the Reclamation Act of 1902 limited its provisions to a 10-year period. 32 Stat. 390.

vested the Secretary with broad discretion.[66] The Act also provided that the Secretary should not enter into such contracts if there were other practicable sources of water for these nonirrigation uses, or if the delivery of water for these purposes would be detrimental to water service for irrigation; it further required him to obtain the approval of the contract by the project's water users' association (*ibid.*). Although a hierarchy of preferences was a basic element of State water law,[67] these provisions created a new federal hierarchy of substantive preferences.

Professor Sax has discussed the significance of the 1920 Act as follows (37 Colo. L. Rev. at 73):

> An examination of the legislative history will show the usual assertions by some Western congressmen that the Secretary was to follow state law and that the reclamation laws are subject to state law, but it is now obvious that these statements do not represent what the Congress as a whole was doing in the reclamation laws. The statutes themselves show a growing

[66] 43 U.S.C. 521 provides: "The Secretary of the Interior in connection with the operations under the reclamation law is hereby authorized to enter into contract to supply water from any project irrigation system for other purposes than irrigation, upon such conditions of delivery, use, and payment as he may deem proper * * *."

[67] For example, Kansas recognizes the following "order of preference," Kan. Stat. Ann. § 82a—707(b) (1977): "[d]omestic, municipal, irrigation, industrial, recreational and water power uses." Texas recognizes a somewhat different hierarchy. Tex. Water Code Ann. § 5.024 (1972). See 5 Clark, *Waters and Water Rights* §§ 408.4, 425 (1972).

> body of reclamation law built upon the exercise of federal discretion and with a growing catalogue of substantive federal standards and protections. Likewise the debate on the 1920 Act shows that congressmen from other parts of the country were concerned about utilizing federal standards to decide such questions as whether, under the bill proposed, the irrigation preference in the bill was to permit displacement of established commercial uses by subsequently developing irrigation demands. They were not willing to have either the states or the water users "dictate" reclamation policy to the Secretary or to the Congress. [Footnote omitted.]

The Reclamation Project Act of 1939, 53 Stat. 1187, 43 U.S.C. 485 *et seq.*, was a comprehensive amendment to the reclamation laws designed "* * * to protect the investment of the United States in such projects, and for other purposes * * *." H.R. Rep. No. 995, 76th Cong., 1st Sess. 1 (1939). The Act provides "a feasible and comprehensive plan for the variable payment of construction charges on United States reclamation projects" (*ibid.*), and reaffirms the Secretary's broad general authority, authorizing him "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect." Section 15, 43 U.S.C. 485i.

The debates on the 1939 Act disclosed an increasing congressional concern with the federal investment in

reclamation projects.[68] The debates also disclosed what Professor Sax has called "a much more important development which is central to an understanding of modern reclamation law. This development is the congressional interest in utilizing the reclamation laws as an instrumentality for the effectuation of a broad range of other important federal policies." 37 Colo. L. Rev. at 74. Thus, in Section 9(c) of the Act, 43 U.S.C. 485h(c), Congress decided to give a preference for project-produced power to Rural Electrification Act projects. Congressman Robinson explained the reason in words that, as Professor Sax notes (37 Colo. L. Rev. at 74), "perfectly epitomize modern federal reclamation attitudes":

> The bill simply says that any power that is produced on the project shall be first sold * * * to agencies in which the Government is now investing its money. [84 Cong. Rec. 10224 (1939).]

Reflecting this attitude, many acts authorizing individual reclamation projects include provisions express-

[68] Professor Sax writes: "The history of the debates on this Act is full of statements like these: 'Since we are lending hundreds of millions of dollars * * * is there any reason on earth why we should not * * *', or 'The United States Government is investing vast sums of money * * *', 'This bill gives preference * * * and that should be done because the Government is furnishing the money for those projects.' In short, we begin now to see expressed in the Congress the attitude which Mr. Justice Clark stated in the *Ivanhoe* case when he noted that the United States obviously is entitled 'to regulate that which it subsidizes'" 37 Colo. L. Rev. at 74 (footnotes omitted) (citing 84 Cong. Rec. 10222, 10223, 10224 (1939) and *Ivanhoe Irrigation District* v. *McCracken*, *supra*, 357 U.S. at 296).

ing additional congressional policies. For example, provisions designed to discourage the production of certain excess agricultural products, by prohibiting the delivery of project water to newly irrigated lands for the production of those products, are common in recent authorizations.[69]

4. OTHER FEDERAL LEGISLATION APPLICABLE TO RECLAMATION PROJECTS

In the past 20 years Congress has enacted a variety of other laws that apply to reclamation projects, thereby expanding the catalogue of federal policies that reclamation is expected to serve.

The Fish and Wildlife Coordination Act of 1958, 72 Stat. 563, as amended, 16 U.S.C. 661 *et seq.*, requires that before any impoundment of water is proposed or

[69] *E.g.*, Act of October 20, 1972, Section 307, 86 Stat. 968, 43 U.S.C. (Supp. V) 615vvv (Salmon Falls Division, Upper Snake River Project); Act of October 20, 1972, Section 405, 86 Stat. 969, 43 U.S.C. (Supp. V) 615bbbb (O'Neill Unit, Pick-Sloan Missouri Basin Program).

As another example, the Act authorizing the Fryingpan-Arkansas Project directed the Secretary to construct and operate public recreational facilities, "to conserve the scenery, the natural, historic, and archeologic objects and the wildlife on [project] lands," and to provide for such public use and enjoyment of these features "and of the water areas created by this project" as would be consistent with the purposes of the project. Act of August 16, 1962, Section 4(a), 76 Stat. 391, 43 U.S.C. 616c(a).

Another authorizing Act required that the Secretary not operate the project in a manner that would cause the water table available for irrigation or domestic wells in existence prior to construction of the project to drop more than two feet, or in a manner that would cause a reduction in artesian flows. Act of October 20, 1972, section 102, 86 Stat. 964, 43 U.S.C. (Supp. V) 615bbb (Closed Basin Division, San Luis Valley Project).

authorized by a federal agency for any purpose, the agency must consult with the Fish and Wildlife Service of the Department of the Interior with a view to the conservation and development of wildlife resources in connection with the project. The resulting "recommendations of the Secretary of the Interior on the wildlife aspects of such projects" must be submitted to Congress as part of the project report. These recommendations "shall be as specific as is practicable with respect to features recommended for wildlife conservation and development * * *," and the project plan "shall include such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits." Section 2(b), 16 U.S.C. 662(b).

The Federal Water Project Recreation Act of 1965, 79 Stat. 213, 16 U.S.C. 460*l*–12 *et seq.*, provides that whenever a reclamation or other federal water project "can reasonably serve" the purposes of outdoor recreation or fish and wildlife enhancement consistently with the provisions of that Act, "it shall be constructed, operated and maintained accordingly." 16 U.S.C. 460*l*–12.

The Federal Water Pollution Control Act, as added, 86 Stat. 816, 33 U.S.C. (Supp. V) 1251 *et seq.*, as amended by Pub. L. 95–217, 91 Stat. 1566, declares a national policy for the prevention, control and abatement of water pollution. Section 102(b) of the Act, 33 U.S.C. (Supp. V) 1252(b), as amended by Pub. L. 95–217, 91 Stat. 1567, provides that in the planning

of a reservoir the Corps of Engineers and the Bureau of Reclamation shall consider the inclusion of storage for the purpose of regulating streamflow for water quality control, and, with the advice of the Administrator of the Environmental Protection Agency, they are to determine the need for, and value of, storage for this purpose. The Administrator's comments on this question, as well as those of the Bureau or the Corps, are to be submitted to Congress (*ibid.*). The value of storage for this purpose is to be included in the calculation of the economic value of the project, and if the benefits are widespread or national the costs are to be nonreimbursable (*ibid.*).

In addition to the policies Congress has articulated in legislation dealing with water projects, more general federal legislation, setting standards and expressing policies for all federal undertakings, is applicable to reclamation projects. The most important example is the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.* NEPA requires all federal agencies to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" an environmental impact statement that analyzes the consequences of the proposed action and the available alternatives. Section 102(2)(C), 42 U.S.C. 4332 (2)(C). NEPA also requires, as will be further noted shortly, consultation and cooperation with officials of an affected State. *Ibid.*

NEPA applies, of course, to reclamation projects such as New Melones,[70] and its impact is felt on at least two levels. First, since a proposed reclamation project must seek both an authorization and an appropriation from Congress, the statement required by NEPA serves to make Congress aware of the environmental consequences of the project, the possible alternatives and mitigation measures, and the views of all affected federal, state, and local agencies. Congress then can weigh the various, often competing policies applicable to the proposal and make its decision, resolving inter-governmental conflicts in the process.

Second, the NEPA statement tells the responsible federal officials—particularly the Secretary of the Interior, in the case of a reclamation project—of the environmental impacts, the available alternatives, and the views of other federal agencies and affected States, local governments and concerned citizens and groups. Thus the official also can weigh all the policies applicable to project decisions that are within the limits of his statutory powers, and exercise informed judgment on the decisions that shape the project.[71]

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[70] See *Environmental Defense Fund, Inc.* v. *Armstrong*, 487 F. 2d 814 (C.A. 9), certiorari denied *sub nom. Environmental Defense Fund, Inc.* v. *Stamm*, 416 U.S. 974.

[71] Another important general statute is the Endangered Species Act of 1973, 87 Stat. 892, 16 U.S.C. (1976 ed.) 1531 *et seq.* Its purposes are, among other things, "to provide a program for the conservation of * * * endangered species and threatened species * * *" (Section 2(b), 16 U.S.C. (1976 ed.) 1531(b)). Section 7 of the Act (16 U.S.C. (1976 ed.) 1536) requires the Secretary of the Interior to review all programs he administers and utilize them in furtherance of the Act's purposes; it requires all other federal

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In sum, Congress has established, through the reclamation laws, through Acts authorizing individual reclamation projects, and through general environmental legislation governing federal water projects and all federal undertakings, a broad variety of federal policies that apply to federal reclamation projects. Contrary to petitioners' suggestion (Br. 60, 61), most if not all of these policies are necessarily concerned with the "use of water" by and from the projects.

Even if one looks only at these policies as expressly set forth in congressional enactments, one would have to conclude that their number and pervasiveness leave little room for the assertion of state controls on the operation or uses of a federal reclamation project. For example, if NEPA is to operate as Congress intended, important decisions concerning the impoundment and the uses of water in a project such as New Melones cannot be within the province of a state administrative agency, since they would thus be removed from the province of federal decisionmaking that NEPA contemplated.[72]

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agencies to do the same, in consultation with the Secretary; and it further provides that the Secretary is to make his determinations of critical habitats of endangered or threatened species "after consultation as appropriate with the affected States * * *."

[72] NEPA states (Section 102, 42 U.S.C. 4332): "Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter." The point is well illustrated by the New Melones Project; the state Board's Decision 1422—avowedly based on concerns such as water quality control, fish conservation, energy needs, and preferred forms of recreation—overrides the decisions made by federal officials on the basis of the environmental impact statements for the project that were upheld in *Environmental Defense Fund, Inc.* v. *Armstrong*, 487 F. 2d 814 (C.A. 9), certiorari denied *sub nom. Environmental Defense Fund, Inc.* v. *Stamm*, 416 U.S. 974.

This conclusion becomes inescapable when additional points are considered. One is the particular congressional policy, itself expressed in the enactments, of delegating to the responsible federal official, the Secretary of the Interior, broad authority to operate and maintain the projects pursuant to the applicable statutes. Contrary to petitioners' suggestion (Br. 60), Congress has not left open the question, "Who should fill in these details." Congress has provided that the Secretary should. In addition, Congress has provided for a decision-making process with respect to federal reclamation projects that substantially involves the States. It has provided for a state role of consultation, coordination, and cooperation that cannot be reconciled with the power claimed by the State Board here to assert unilaterally its own mandatory controls over critical decisions concerning the project.

B. CONGRESS HAS PROVIDED FOR FEDERAL CONSULTATION WITH THE STATES IN THE PLANNING OF RECLAMATION PROJECTS INSTEAD OF VESTING THE STATES WITH CONTROL OVER PROJECT OPERATION

Reclamation projects are direct federal undertakings that involve the expenditure of large sums—over $220 million to date for New Melones—and the construction of large facilities that are federally owned

and operated. As Judge Carter suggested in his concurring opinion in the court of appeals (A. I, 35), it would be strange if "Congress provid[ed] that the states, by a permit process, may control the operation of federally constructed, funded, and operated water and power projects."

Congress has responded, however, to the States' desire to have a voice in the formulation of reclamation policy and in the shaping of projects within their borders. It has integrated the States into the process of formulating the policy and especially into the planning of individual projects.

1. FEDERAL STATUTES GIVE THE STATES A ROLE IN PLANNING RECLAMATION PROJECTS

Expressly recognizing the States' interest, Congress in a series of reclamation statutes has required federal consultation and coordination with the States.

For example, Section 1 of the Flood Control Act of 1944, 58 Stat. 888, 33 U.S.C. 701–1, which authorized many reclamation projects, including New Melones, provided:

> * * * [I]t is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized * * *.

To effectuate this policy, the Act required that plans, proposals, or reports for new projects could not be

submitted to Congress unless the investigations on which they were based had been——

> conducted in such a manner as to give to the affected State or States, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and, to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. [Section 1(a), 33 U.S.C. 701–1(a).]

The Chief of Engineers was required to submit his proposed report to each affected State, which might submit its views and recommendations in response. *Ibid.* The State's views and recommendations were to be submitted to Congress along with the proposed report. *Ibid.*

Under Section 1(c) of the Act, 33 U.S.C. 701–1(c), the Secretary of the Interior was subject to the same requirements of coordinating his investigations of proposed irrigation projects with the States and submitting his proposed reports to them. Section 1(c) provided that in any case where a submission of views and recommendations by an effected State

> sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress * * *.

Congress has also mandated consultation with state officials regarding specific aspects of reclamation project planning. Thus, Section 2 of the Fish and Wild-

life Coordination Act of 1958 (72 Stat. 564, as amended, 16 U.S.C. 662), see p. 98, *supra,* declares that whenever any federal agency proposes to impound any body of water, the agency must consult not only with the United States Fish and Wildlife Service but also with the "head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources * * * as well as providing for the development and improvement thereof in connection with such water-resource development." Any report prepared by the state agency is to "be made an integral part" of any report submitted to Congress by the federal agency responsible for the construction of the project, and the project reports are to "give full consideration" to the report and recommendations of the state agency (Section 2(b), 16 U.S.C. 662(b).)

The Water Supply Act of 1958 (72 Stat. 319, as amended, 43 U.S.C. 390b) declares it to be "the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes," and states that "the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects" (*ibid.*).

To carry out this policy, the Act provides that in the planning of dams by the Corps of Engineers or the Bureau of Reclamation, impoundment of water may be included to meet present and future needs for municipal and industrial use."[73]

In the Federal Water Project Recreation Act of 1965 (79 Stat. 213, 16 U.S.C. 460*l*–12 *et seq.*), Congress provided for consultation with the States regarding recreation and fish and wildlife enhancement before the submission to Congress of plans for a reclamation project."[74] Moreover, the Act requires, with certain exceptions,"[75] that after 1965 the construction of such facilities be dependent on the acceptance by state and local public agencies of responsibility for administration and partial cost sharing. See Sections 2 and 3(b) of the Act, 16 U.S.C. 460*l*–13, 460*l*–14(b).

In addition, Congress has provided a framework for federal-state planning for the coordinated development of water and land resources in large geographic regions. The Water Resources Planning Act,

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[73] *Ibid.* Up to 30 percent of the cost of a project may be allocated to anticipated future use, if state or local interests give reasonable assurances that there will be a need for the provisions and that they will be paid for within 30 years after they are first used.

[74] Section 6 of the Act, 16 U.S.C. 460*l*–17, requires that the views of the Secretary of the Interior regarding the outdoor recreation aspects of a project plan that is submitted to Congress include a discussion of the degree to which the proposed recreation and fish-and-wildlife development accords with the State's overall plans.

[75] See Sections 3 and 6, 16 U.S.C. 460*l*–14, 460*l*–17.

79 Stat. 244, 42 U.S.C. 1962 *et seq.*, adopted in 1965, declares it the policy of Congress:

> to encourage the conservation, development, and utilization of water and related land resources of the United States on a comprehensive and coordinated basis by the Federal Government, States, localities, and private enterprise * * *.

To this end Title II of the Act (42 U.S.C. 1962b–1962b–6) authorizes the President to establish river basin commissions, including both state and federal officials, which would serve as "the principal agency for the coordination of Federal, State, interstate, local and non-governmental plans for the development of water and related land resources in its area, river basin, or group of river basins" (42 U.S.C. 1962b(b)(1)).

Finally, as we have noted (pp. 100–102, *supra*), the National Environmental Policy Act, which applies to reclamation projects such as New Melones, mandates the involvement of state and local agencies. Section 102(2)(C) of the Act (42 U.S.C. 4332(2)(C)) provides that along with copies of the environmental impact statement prepared by the responsible federal official,

> * * * the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;[76]

2. THE STATE OF CALIFORNIA WAS FULLY INVOLVED IN THE PLANNING AND AUTHORIZATION OF THE NEW MELONES PROJECT

The combined result of the statutes just outlined is to draw the affected States into the formulation and planning of reclamation projects at every stage.[77] The State is given access to information developed during the investigation of a new project. The proposed project reports are sent to the State for comments and recommendations. State officials are consulted regarding specific matters such as wildlife and recreation planning, present and future needs for municipal and industrial water supplies, and water quality control. State and local authorities are given opportunities to have certain features provided in the projects by sharing the costs, and in some cases by accepting administrative responsibilities for recreation or wildlife facilities. Evaluation of the environmental impact requires opportunity for state and local participation. Perhaps most important, the State's views and rec-

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[76] Also as noted earlier (p. 101 n. 71, *supra*), the Endangered Species Act of 1973 (16 U.S.C. (1976 ed.) 1531 *et seq.*) gives the States an advisory role to the Secretary of the Interior.

[77] The current procedures for initiating a reclamation project, which spring from Section 9(a) of the Reclamation Project Act of 1939, 53 Stat. 1193, are described by Professor Sax in 2 Clark, *Waters and Water Rights* § 112.2 (1967). The description is reproduced in the *amicus* brief of the Pyramid Lake Paiute Tribe of Indians, at 14–18.

ommendations on the proposed project are submitted to Congress along with those of the federal agencies."[78]

As a practical matter, of course, the views of a State and of the State's representatives in Congress on a bill to authorize a reclamation project in that State are not without influence. If the State opposed the project, its authorization would not be likely.

The procedures just outlined were followed here, with slight variations. The State of California was fully involved in the planning and authorization of the New Melones Project.

Because New Melones was initially authorized in 1944 as a flood control project to be constructed by the Corps of Engineers (rather than a multi-purpose project, which would ordinarily be constructed by the Bureau of Reclamation), the initial report and analysis underlying the 1962 authorization was prepared by the District Engineer of the Corps, rather than the Regional Director of the Bureau (Project Document, at 13–62). This report was submitted by the Corps to the Secretary of the Interior and the State of California (see App. A, *infra,* pp. 1A–27A). California endorsed the project and recommended its approval (*id.* at 26A), with certain qualifications."[79]

[78] Under the Flood Control Act of 1944, if an affected State expresses objections to a project plan, that project can only be approved by an Act of Congress. See p. 105, *supra.*

[79] The qualifications were that recognition should be given to the rights of upstream users who were dependent on the waters of the Stanislaus River; that water should be released for downstream fisheries, and land acquired for fish and wildlife; that studies should be authorized to develop the full potential of the North Fork of the Stanislaus River; and that the Bachelor Service area should be provided with water (App. A, *infra*, pp. 26A–27A). The Chief of the Corps of Engineers responded (Project Document, at xxxiv–xxxv) that the Bureau and the Corps intended to recognize the needs of upstream users; that the Corps had accepted the recommendations of the Fish and Wildlife Service, which were consistent with California's recommendations, concerning downstream fish releases; that the Corps intended to serve the needs of local areas (such as Bachelor); but that the additional studies suggested would be within the purview of the Bureau of Reclamation.

Both the State's comments and the Corps' response were included in the Project Document submitted to Congress. Congress reauthorized the project "substantially in accordance with the recommendations of the Chief of Engineers" (76 Stat. 1191).

After the 1962 reauthorization, consultation between federal and State officials in planning the New Melones Project continued. One example is the Memorandum of Agreement signed in 1969 by the Bureau and the Central Valley Regional Water Quality Control Board, concerning the water quality releases to be made from the project (A. II, 148–151).

In addition, the Bureau's practice of following state filing requirements to appropriate water for its projects has provided for further coordination between the federal government and the State with respect to the New Melones project. As petitioners note (Br. 43–45), the permit systems developed by California and other western States regarding the appropriation of water rights enable the State to "quantify the federal water right[s]" and thus "to quantify the amount of unappropriated water that remains avail-

able for use by others." The Bureau's filings in this case gave the state Board that information.[80]

Thus, the existing, congressionally mandated procedures provide full opportunity for the affected States and state agencies to make their views on a proposed reclamation project known to Congress and to work with federal officials in planning the project. These procedures would be pointless if, as petitioners contend, the States could impose unilateral conditions on reclamation projects by way of their appropriation permits. Then the state Board would have the final authority over the specifications, functions, and operation of the project, with power to override not only decisions of the Secretary of the Interior but mutual agreements between federal and state authorities. The proposal cannot be squared either with the congressional scheme for federal-state cooperation or with the fundamentally federal nature of the project.

C. CONGRESS HAS RECOGNIZED A NEED FOR UNITARY ADMINISTRATION AND ULTIMATE ADMINISTRATIVE AUTHORITY WITH RESPECT TO RECLAMATION PROJECTS, AND HAS GIVEN THESE FUNCTIONS TO THE SECRETARY OF THE INTERIOR

Planning for a reclamation project requires analysis of the value of the proposed project and the need

[80] In fact, the Bureau's filings gave the Board information in considerable detail, including the point of diversion, point of use, uses for which the water was to be applied, and other information (A. II, 41–47). See the brief of *amici* Friant Water Users Association *et al.* (at 23–26) for a description of the information available to the state Board from such filings under California law.

for it, of its engineering and economic feasibility, of the balance of reimbursable and nonreimbursable project functions, and of the application of congressionally established policies regarding environmental protection, fish and wildlife conservation, outdoor recreation, water quality, and many other things. These judgments, and others that may be expressed in particular project authorizations, guide the construction and operation of individual projects. Pursuant to this delegated authority, the Secretary of the Interior contracts for the sale of project water and project power, having in mind both the financial consequences and the policy considerations involved.

Moreover, reclamation projects are often interrelated. The 1962 reauthorization of New Melones, for example, provides that it "shall become an integral part of the Central Valley Project" (76 Stat. 1191)—a project that presently includes seven main storage reservoirs, with two more under construction.[81]

Accordingly, this Court's comments in *Arizona* v. *California, supra,* 373 U.S. at 589–590, apply with equal force to New Melones and other reclamation projects:

> It was only natural that the United States, which was to make the benefits available and which had accepted the responsibility for the project's operation, would want to make certain

[81] For a description of the current operations of the Central Valley Project, see Department of the Interior, Bureau of Reclamation, *Total Water Management Study for the Central Valley Basin, California: Interim Water Supply* (*Working Document No. 9*, March 1976).

> that the waters were effectively used. All this vast, interlocking machinery—a dozen major works delivering water according to congressionally fixed priorities for home, agricultural, and industrial uses to people spread over thousands of square miles—could function efficiently only under unitary management, able to formulate and supervise a coordinated plan that could take account of the diverse, often conflicting interests of the people and communities of the Lower Basin States. Recognizing this, Congress put the Secretary of the Interior in charge of these works and entrusted him with sufficient power, principally the § 5 contract power, to direct, manage, and coordinate their operation.

While Congress has provided for extensive coordination between federal and state entities in the planning of reclamation projects, it has also delegated to the Secretary of the Interior, pursuant to the reclamation laws generally and the New Melones authorization in particular (see 76 Stat. 1191; pp. 91–103, *supra*), broad authority to operate and maintain reclamation projects. Such a choice was necessary. As Professor Sax has noted, "[i]f there is to be a joint, comprehensive, and co-ordinated program, legal mastery of it must come to rest somewhere" (2 Clark, *supra*, § 124, at 284).[82]

[82] Project needs may vary over time. The Bureau does have a degree of operational flexibility to meet changing conditions, and it attempts to exercise this flexibility in coordination with the States (see remarks by Gilbert G. Stamm, Commissioner of Reclamation,

Not unnaturally, Congress has lodged that legal mastery in the federal government. Petitioners would lodge it in the state Board—but only, they claim, "where Congress has not spoken" (Br. 59). Their proposal is unworkable. It would invite repeated recourse to the state Board by state and local authorities, water users, citizens' groups, and individuals who did not get what they wanted from Congress or the Secretary of the Interior.[83] It would invite repeated rulings by the state Board on whether or not particular aspects of a project were within the scope of "the specific laws and policies established by Congress, including the purposes of its individual projects" (Br. 59).

And there would follow repeated litigation, such as this case. It would be left to the courts, faced with the 25 conditions of Decision 1422 or their legion of siblings, to decide whether or not, by each of them, "the project's purposes [would be] impaired" (*Ibid.*). The result would be to transfer to the courts the planning and operational authority over the proj-

A. II, 101, 108–110). More substantial changes in conditions may require an alteration in the basic project plans. If an affected State believes such a change is warranted, it can return to the Secretary and to Congress.

[83] Needless to say, it cannot be assumed that particular policy positions, such as those stressing "environmental" values, would coincide generally with either the federal or the state position. For example, other western States may not share the concern that the California Board asserts here for fish and wildlife and white water rafting. In any event, such policy preferences vary not only from state to state but from time to time.

ect—an inherently administrative kind of authority—that Congress gave to the Secretary.

IV

THE LANGUAGE, THE LEGISLATIVE HISTORY, AND THE ADMINISTRATIVE CONSTRUCTION OF SECTION 8 ALL FAIL TO SUPPORT PETITIONERS' VIEW OF THE STATUTE AS ALLOWING THE STATES TO IMPOSE CONDITIONS ON THE OPERATION OF FEDERAL RECLAMATION PROJECTS

Petitioners rely (Br. 17–40) on the language, the legislative history, and the alleged administrative interpretation of Section 8 to argue that it "provides for state control of appropriation and distribution of water developed under the act" (Br. 19). Given this Court's pronouncements in *Ivanhoe,*[84] *City of Fresno,*[85] and *Arizona* v. *California,*[86] *supra,* rejecting "[t]he argument that § 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities laid down by state law" (*Arizona* v. *California, supra,* 373 U.S. at 586), petitioners are essentially asking the Court to reconsider and overrule those cases.[87] There is no basis for doing so. The language of Section 8, the legislative history, and the administrative practice all support the interpretation that the Court announced in those cases.

[84] 357 U.S. 275, 291–292.

[85] 372 U.S. 627.

[86] 373 U.S. 546, 586–587.

[87] See Pet. Br. 52–53 n. 40. Dean Meyers as *amicus* makes the request explicit (Br. 5, 11–12, 14).

A. THE RECLAMATION ACT OF 1902 REFLECTED A CONGRESSIONAL DETERMINATION THAT RECLAMATION WAS A PROGRAM OF NATIONAL IMPORTANCE THAT SHOULD BE UNDERTAKEN AND CONTROLLED BY THE FEDERAL GOVERNMENT, NOT THE STATES

We start, chronologically, with the legislative history. It indicates, as the district court concluded (A. I, 67), that the 1902 Congress viewed reclamation as "an undertaking of national concern, transcending the often arbitrary geographic boundaries of individual states and territories" and necessitating "broad federal power in the development and construction of reclamation projects." Section 8 as originally drafted included strong "States' rights" language, but this language was modified and state law given a restricted role in the final Act. Although the debates on Section 8 include statements of the most extreme opposing views,[88] the 1902 Act as a whole, especially when viewed in the light of succeeding reclamation legislation, confirms this Court's view that federal reclamation projects are large-scale undertakings deliberately placed by Congress under the unitary control of federal officials, particularly the Secretary of the Interior. Congress did not intend to subject these comprehensive programs, which incorporate a host of fed-

[88] The commentary on the history of the reclamation laws suggests that in many cases the "subtlety of reclamation law and politics" resulted in "congressional deference to state control [that] was more verbal than real." Sax, *Problems of Federalism in Reclamation Law*, 37 Colo. L. Rev. 49, 70–71 (1964). Cf. *Wirtz* v. *Glass Bottle Blowers Association*, 389 U.S. 463, 468.

eral policies and goals, to state administration and control.

Because of the failure of both private and state efforts at irrigating the arid lands in the West, pressure had been mounting during the final decade of the 19th century for some form of federal support for irrigation. Many bills on the subject were introduced in Congress during the years 1898–1902.[89]

As petitioners acknowledge (Br. 20–21), the legislative history of the 1902 Act reflects a determination by Congress that reclamation of the arid West was of not merely local, but national, importance. Both the House and Senate Committee Reports urging passage of S. 3057—the bill that ultimately became the Reclamation Act of 1902—in the First Session of the Fifty-Seventh Congress (1902) emphasized that only the federal government could successfully undertake large reclamation projects. As the House Report stated, the magnitude of the contemplated projects "clearly place[s] them beyond the reach of private enterprise," and in any event "the importance of this class of works to a large number of users is so great that it is very questionable, as a matter of public pol-

[89] See, *e.g.* 55th Cong., 2d Sess. (1898): S. 4017, H.R. 9994; 55th Cong., 3d Sess. (1899): H.R. 11795; 56th Cong., 1st Sess. (1900): S. 205, H.R. 5022; 56th Cong., 2d Sess. (1901): H.R. 13846, S. 5833, H.R. 13993, H.R. 14072, H.R. 14088, H.R. 14165, H.R. 14192, H.R. 14203, H.R. 14241, H.R. 14250, H.R. 14280, H.R. 14338; 57th Cong., 1st Sess. (1902): H.R. 52, H.R. 63, H.R. 125, S. 595, H.R. 7676, H.R. 9676, and S. 3057 (the last cited bill ultimately became, *as amended*, the 1902 Reclamation Act).

icy, whether they should ever pass out of public control." H.R. Rep. No. 1468, 57th Cong., 1st Sess. 3 (1902); see also S. Rep. No. 254, 57th Cong., 1st Sess. 5 (1902). The House Report added: "It will be readily understood that with no source of revenue for the irrigation of these lands except ordinary taxation and with but a small portion of their lands taxable the States can not, by any possibility, secure funds to carry on reclamation" (H.R. Rep. No. 1468, *supra*, at 4).

The debates highlighted reasons why state control of reclamation was rejected. Representative Mondell pointed out (35 Cong. Rec. 6676) [90] that if the States undertook reclamation,

> * * * the disposition would be to utilize all of the waters flowing through a State within the State, provided there was no prior appropriation lower down on the stream, regardless of the most beneficial and economical development of the irrigation possibilities of the entire region. Further, the constitutions of some of the States forbid the undertaking of works of internal improvement; and even were the States the proper agency through which to carry on this development, none of the States in the arid region are financially able to do so.

Congressman Reeder said (35 Cong. Rec. 6740):

> We have been told that the Government, which is the owner of these lands, should not

[90] Unless otherwise noted, references to the Congressional Record are to the proceedings of the 57th Congress, 1st Session, in 1902.

> reclaim them itself, but should cede them to the States. It is a sufficient answer to that to say that many State grants have been already made of different amounts of land and for different purposes, and the experience of the past has demonstrated beyond any question that the States can not be safely intrusted with the reclamation and settlement of these lands. No matter what conditions might be imposed on such a grant, schemers and speculators would find some way of manipulating the State legislatures and getting control of the lands in large tracts which would retard settlement.

And Congressman Newlands, whom petitioners describe as "[t]he leading congressional authority on reclamation" (Br. App. 1a), stated (35 Cong. Rec. 6673):

> Both [political] parties declared in favor of the reclamation of these arid lands by the National Government and the holding of such lands for actual settlers, and in so declaring they but followed the general sentiment of the country, which was against any abandonment of its trust by the National Government and its surrender to the States.

B. SECTION 8 WAS AMENDED TO ELIMINATE A PROVISION THAT STATE LAW SHOULD CONTROL THE USE AND DISTRIBUTION OF RECLAMATION WATER

An important issue before Congress was the extent of control the States would have over the waters made available by reclamation. Section 8 of S. 3057, as originally drafted and passed by the Senate, contained a strong "States' rights" provision:

> SEC. 8. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, *but State and Territorial laws shall govern and control in the appropriation, use, and distribution of the waters rendered available by the works constructed under the provisions of this act:* Provided, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right. [S. 3057, 57th Cong., 1st Sess., § 8 (1902); emphasis added.]

Had this language been enacted, it would have offered substantial support for petitioners, who virtually track the italicized language in asserting that Section 8 "provides for state control of appropriation and distribution of water under the act" (Br. 17).[90a] But the italicized language was not enacted. It was deleted by the House Committee on Irrigation of Arid Lands. H.R. Rep. No. 1468, 57th Cong., 1st Sess.

[90a] Even so, it is difficult to see how even the italicized language would have authorized a State to prevent the impoundment of a reservoir, or otherwise to prevent the "works constructed under the provisions of this act" from rendering waters available in the first place.

(1902). The Committee's amended version was Section 8 as ultimately enacted, reading as follows:

> SEC. 8. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, *or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any land owner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof:* Provided, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right. [Emphasis added.] [91]

[91] Petitioners, in an appendix to their brief (Br. App. 1a), claim that the House Committee's amendment had no effect. They report Congressman Newlands as stating "that the amended bill was 'identical in its provisions, though differing somewhat in phraseology,' with the original bill, and that the amended bill was 'absolutely in harmony with the original bill.'" Br. App. 1a, quoting 35 Cong. Rec. 6673–6674. The record discloses that the "original bill" to which Mr. Newlands was referring was not S. 3057, the bill that the House Committee had amended, but a different bill that Mr. Newlands had introduced "[a]t the last session of Congress, and before Mr. Roosevelt came into power." 35 Cong. Rec. 6673. Newlands stated: "And if the gentleman will examine that bill—introduced in Congress before Mr. Roosevelt became President—he will find that it is identical in its provisions, though differing somewhat in phraseology, with the bill which is now before us for consideration" (*ibid.*). Compare Pet. Br. App. 4a. See also 35 Cong. Rec. 6674, quoted in note 92, *infra*.

The change made by the House Committee resulted at least in part from intervention by President Roosevelt, as explained by Representative Robinson when the bill reached the House floor (35 Cong. Rec. 6670):

> At the beginning of this session the arid-State members in committee assembled properly elected the gentleman from Nevada chairman and proceeded to draft an irrigation bill. The committee was composed of a large majority of Republicans, but politics was submerged to get some irrigation legislation.
>
> The committee, of course, was confronted with platforms and constitutions, national and State. Where they pointed their way, they adopted them; where they ran counter, they ran over them or passed them by.
>
> They took up first the Republican national platform of 1900, and upon that this bill was drafted and introduced in the Senate. After a little while the bill passed without a division in the Senate, and went to the House Committee on Arid Lands, a majority of whose members are from arid or semiarid States.
>
> The troubles then began. The President was for one kind of irrigation, with national control of canals and water distribution, and the Republican platforms, national, State, and Territorial, and some State constitutions of States affected, were for another kind, with State control of canals and water distribution. *The President told the committee that called on him that the Senate bill was not in consonance with his ideas of irrigation; that if the United States*

> *built canals it should, to keep the water supply from politicians, control the distribution.* [Emphasis added.] [92]

President Roosevelt's autobiography supports Robinson's account of the purpose of the amendment:

> On the day the message was read, a committee of Western Senators and Congressmen was organized to prepare a Reclamation Bill in accordance with the recommendations. By far the most effective of the Senators [*sic*] in drafting and pushing the bill, which became known by his name, was Newlands. The draft of the bill was worked over by me and others at several conferences and revised in important particulars; *my active interference was necessary to prevent it from being made unworkable by*

[92] Petitioners contend that this statement "was immediately clarified in part, and repudiated in part, by Congressman Newlands" (Br. App. 4a), a contention they base on the statements by Newlands (35 Cong. Rec. 6673–6674) previously cited by petitioners at Br. App. 1a and discussed in note 91, *supra*. In fact, Newlands was responding to Robinson and discussing the President's intervention with respect to the issue, not of state control, but of "monopoly and concentration of ownership"—"[w]e all wanted to preserve that domain in small tracts for actual settlers and homebuilders." 35 Cong. Rec. 6674. But the passages quoted by petitioners, in which Newlands denied the significance of the President's intervention, again asserted the similarity, not between the bill then pending in the Senate and the same bill prior to the House's amendment of Section 8, but between the pending bill and the "original bill" that Newlands had introduced in the previous Congress. Thus: "And let me say to the gentleman from Indiana [Robinson], lest he charge that our action was the result of Executive dictation, that these changes were absolutely in harmony with the original bill, which I had introduced before Mr. Roosevelt succeeded to the Presidency, and with the platform of both parties." 35 Cong. Rec. 6674; compare Pet. Br. App. 1a.

> *an undue insistence upon State Rights,* in accordance with the efforts of Mr. Mondell and other Congressmen, who consistently fought for local and private interests as against the interests of the people as a whole.

Theodore Roosevelt, *An Autobiography* 396 (Scribners' Sons ed., 1926) (emphasis added).[93]

[93] Petitioners put foward a contrary view of the purpose of the amendment. They suggest that the President's later statements are of dubious "admissibility" (Br. App. 4a–5a), and they quote at length from a "contemporaneous account" (Br. App. 3a) of the President's actions. This account is identified only as "A Washington dispatch of April 2d" found in the newspaper records of Humboldt County, Nevada (A. II, 113). Petitioners also contend (Br. 23) that the following portion of President Roosevelt's statement to Congress, 35 Cong. Rec. 6775, supports their interpretation of Section 8:

"These irrigation works should be built by the National Government. * * * The distribution of the water, the division of the streams among irrigators, should be left to the settlers themselves in conformity with State laws and without interference with those laws or with vested rights. The policy of the National Government should be to aid irrigation in the several States and Territories in such manner as will enable the people in the local communities to help themselves, and as will stimulate needed reforms in the State laws and regulations governing irrigation."

This statement draws a distinction between the main irrigation works, such as reservoirs and canals, to be built by the federal government, and the distributing system, to be built by individual irrigators. The House Report reflects the same distinction, pointing out that "it is not expected or contemplated that the works constructed by the Government will include anything but reservoirs and the main canals, leaving, even under the systems constructed by the Government, all of those diversion and distribution works which may be constructed by individual or cooperative effort, to be so constructed." H.R. Rep. No. 1468, *supra*, at 9. Senator Hansbrough likewise noted, 35 Cong. Rec. 1385, that individual settlers would build "their own distributing systems."

Petitioners suggest that the purpose of the amendment was to meet objections that an upstream State might, if it had absolute control of water, limit the flow of interstate waters to downstream users (Br. App. 2a). But the legislative history shows only that such objections were made—both before and after the Committee's amendment of Section 8.[94] It does not show that the amendment of Section 8 was intended to meet this objection.

C. THE LANGUAGE OF SECTION 8 DOES NOT SUPPORT THE STATE CONTROL FOR WHICH PETITIONERS CONTEND, SINCE IT REFERS ONLY TO STATE LAWS CONCERNING WATER "USED IN IRRIGATION"

Petitioners contend (Br. 18–19) that the "plain meaning" of Section 8, even as amended, "provides for state control of appropriation and distribution of water developed under the act." They read the statute as compelling the Secretary to proceed in conformity with all state laws relating to the control, appropriation, use, or distribution of water (Br. 18).

Section 8 does not say that. To the extent that it refers to state laws, it refers only to those laws "relating to the control, appropriation, use, or distribution of water *used in irrigation*" (emphasis supplied). The Secretary is directed to "proceed in conformity with" those laws, no others.[95]

[94] H.R. Rep. No. 794 (Minority Report), 57th Cong., 1st Sess. 16 (1902); 35 Cong. Rec. 6696 (Congressman Ray).

[95] Even as to conditions relating to irrigation, state jurisdiction appears to be foreclosed and preempted by Section 8 of the Act of August 13, 1914, 38 Stat. 688, 43 U.S.C. 440, which authorizes the Secretary of the Interior "to make general rules and regulations governing the use of water in the irrigation of the lands within any project * * *."

As our review of the conditions imposed by Decision 1422 (pp. 57–86, *supra*) demonstrates, those conditions have little to do with the use of water in irrigation, except perhaps that they try to prevent it. They are concerned with preventing impoundment of water in the first place (pp. 59–66, *supra*), with preferences for "counties of origin" (pp. 67–70, *supra*), with value choices between different forms of river recreation (pp. 61–65, *supra*), with downstream water quality (pp. 70–75, *supra*), with protection of fish and wildlife (pp. 77–78, *supra*), with structural aspects of the project (pp. 78–80, *supra*), access by state officials and others (p. 82, *supra*), and various other matters unrelated to irrigation.

Thus even on the literal reading of the statute that petitioners urge,[96] there is no basis for including all these non-irrigation-related conditions within the scope of the state laws to which Section 8 refers.

Petitioners seek to overcome this obstacle with a one-sentence footnote (Br. 18 n. 13) suggesting that the limitation of Section 8 was somehow removed when Congress provided, in authorizing subsequent multi-purpose reclamation projects, including New Melones, that they should be operated "pursuant to the Federal reclamation laws." Such enactments, however, do no more than they say; they incorporate Section 8 and the other provisions of the reclama-

[96] See also the *amicus* brief of Dean Meyers, at 11, 14.

tion laws. They do not expand that section or those laws. In the absence of some amendment or modification of Section 8 itself, that statute remains limited to state laws concerning "water used in irrigation."

An analogous question was presented by *First Iowa Hydro-Electric Cooperative* v. *Federal Power* Commission, 328 U.S. 152, discussed at pp. 51–54, *supra*. The statute involved there, Section 27 of the Federal Water Power Act (41 Stat. 1077, 16 U.S.C. 821), provided:

> That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

Although this statute is broader than Section 8, going expressly beyond irrigation uses,[97] the Court held that an Iowa law prohibiting interbasin transfers of water was not saved or incorporated by Section 27 because it fell outside the scope of the section's coverage (328 U.S. at 175–176). Noting the statute's use of the words "or other uses," the Court held that they were "confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes" (*id.* at 176).

[97] This statute, passed in 1920, demonstrates that Congress was aware of the distinction between state water laws relating to irrigation and those relating to other types of uses, and that when Congress intended to save or incorporate state laws relating to municipal and other uses, it said so.

The holding of *First Iowa* limiting the coverage of Section 27 of the Federal Water Power Act to specific property rights defined by state law applies *a fortiori* here, since Section 27 refers to "water used in irrigation or for municipal or other uses" whereas Section 8 is limited to "water used in irrigation." In *Arizona* v. *California, supra,* 373 U.S. at 588 n. 93, this Court noted the close connection between Section 27 as construed in *First Iowa* and the almost identical Section 18 of the Boulder Canyon Project Act, 45 Stat. 1065, 43 U.S.C. 617q (see pp. 47–50, *supra*).

D. SECTION 8 REAFFIRMS THAT STATES ARE FREE TO ADOPT THEIR OWN SYSTEMS OF WATER LAW AND REQUIRES THE SECRETARY TO RECOGNIZE WATER RIGHTS VESTED UNDER STATE LAW

As the district court recognized (A. I, 63–66), Section 8, as amended, was designed to serve two purposes. It reaffirms that States are free to apply their own rules of water law, and it requires the federal government, in obtaining water for reclamation projects, to recognize vested state water rights in order to determine the property interests for which compensation must be paid.

The introductory portion of Section 8 provides:

> That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder * * *.

As the district court observed (A. I, 64), this provision "was not written upon a clean slate, but rather, on the overlay of prior federal law." The provision reaffirms the federal policy, first adopted in the Act of July 26, 1866,[98] and restated in the Act of July 9, 1870,[99] of ratifying water rights acquired on public lands under state law principles.

That policy had not always been assured. As petitioners note (Br. 32), there had been substantial doubt whether the doctrine of prior appropriation recognized in the Western States governed the acquisition of private water rights on the vast federal lands located in those states. With the adoption of federal land laws permitting the entry and patent of these lands, Congress could have adopted a federal statutory system governing the acquisition of water rights on them. Instead, in Section 9 of the first general mining law, the Act of July 26, 1866, Congress declared that rights that had been acquired "by priority of possession" to the use of water on public lands, and that were "recognized and acknowledged by the local customs, laws, and the decisions of courts," were to be "maintained and protected." As this Court recognized in *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 155, the 1866 and 1870 acts "approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of

[98] Section 9, 14 Stat. 253, as amended, 30 U.S.C. 51.

[99] Section 17, 16 Stat. 218, as amended, 30 U.S.C. 52.

the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain."

At the urging of Western States, provisions have been adopted in many subsequent federal statutes disclaiming any intent to affect or interfere with state water laws or with vested rights acquired under them.[100] See generally Trelease, *Federal-State Relations in Water Law* 79 (1971). These statutes include several that otherwise have little to do with water rights (see, *e.g.*, the Taylor Grazing Act, Section 3, 48 Stat. 1270, as amended, 43 U.S.C. 315b; the Submerged Lands Act, Section 3(e), 67 Stat. 30, 43 U.S.C. 1311(e)). The Court has noted that these provisions were designed to assure the States freedom to develop their own doctrines of water law and to remove any federal impediment to the doctrine of prior appropriation. *California Oregon Power Co., supra,* 295 U.S. at 164. The district court correctly recognized that Section 8 serves the same function (A. I, 65):

> * * * Section 8 does not bind or purport to bind the states to any policy, but recognizes and gives sanction, as far as the United States and its grantees are concerned, to the state law doctrine of appropriative rights to water. In this regard, also, Section 8 guards prior rights

[100] One commentator refers to "the usual boiler plate in federal water laws seeking to protect the rights of the states and to preserve state laws." Haber, *Arizona* v. *California—A Brief Review*, 4 Nat. Res. J. 17, 24 (1964).

> granted by the individual states to individual water users.[101]

The second role of Section 8 complements the first. The statute requires the federal government to recognize vested state water rights when it is acquiring water for a reclamation project. This portion of Section 8 provides that "the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws * * *" —that is, "the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation." Thus, this Court has recognized that Section 8 "leave[s] to state law the definition of the property interests, if any, for which compensation must be made" (*City of Fresno, supra,* 372 U.S. at 630), and that "[a]s we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein" (*Ivanhoe, supra,* 357 U.S. at 291).

This view of the purpose of Section 8 is confirmed by the legislative history. Congressman Martin de-

[101] This was the function described by Congressman Mondell and others in their statements on the House floor quoted by petitioners at Br. 27–29. See, *e.g.*, Mondell's statement (35 Cong. Rec. 6679, quoted at Br. 27): "Every act since that of April 26, 1866, has recognized local laws and customs appertaining to the appropriation and distribution of water used in irrigation, and it has been deemed wise to continue our policy in this regard."

scribed the interrelation of Section 7, which authorized the Secretary to acquire any necessary "rights or property * * * by purchase or by condemnation,"[102] and Section 8 as follows (35 Cong. Rec. 6759):

> This section 7, while an important one, is by no means the most important in the bill. It is drawn identically upon the plan of the general statute of eminent domain of August 1, 1888, which provides the manner in which officers of the United States, when it becomes necessary, may acquire property in the furtherance of any public improvement.
>
> It should be read in connection with section 8, which is in the nature of a limitation upon this section. Section 8 provides that the Secretary of the Interior, when proceeding under this act, must proceed in conformity with the State laws. It therefore makes, taking the two sections together, simply an instruction to the Secretary of the Interior to invoke the aid of State laws upon the subject of eminent domain where necessary.

[102] Section 7, 32 Stat. 389–390 (now codified as 43 U.S.C. 421) provides: "That where in carrying out the provisions of this Act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney-General of the United States upon every application of the Secretary of the Interior, under this Act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice."

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E. THE LEGISLATIVE HISTORY DOES NOT SHOW THAT SECTION 8, DESPITE ITS AMENDMENT, STILL PROVIDED FOR STATE CONTROL OVER FEDERAL RECLAMATION PROJECTS

Since the amendment deleting the strong "States' rights" language from Section 8 (see pp. 120–126, *supra*) was proposed by the House Committee after the Senate had debated and passed the bill, only the House Committee Report and the House debates focused on the amended version of Section 8 that was eventually adopted.[103] Extreme opposing interpretations of the bill were voiced during the debates in the House. Thus, Representative Robinson protested that the bill "involves the robbery of peoples of self-government in States, * * * [requiring them to] submit to be governed 2,000 and 3,000 miles away" (35 Cong. Rec. 6671), while Representative Ray argued that under the bill "[t]he United States Government surrenders all control" (35 Cong. Rec. 6766).

The House Committee Report, however, focused on the role of state law and indicated what that role was to be. The Report noted that "[t]he American irrigator * * * has been instrumental in the adoption of

[103] S. 3057 was passed by the Senate on March 1, 1902, 35 Cong. Rec. 2285. The amendment to the bill was proposed in the House committee report, H.R. Rep. No. 1468, 57th Cong., 1st Sess. 18 (April 7, 1902). The committee amendment was agreed to by the House on June 13, 1902, 35 Cong. Rec. 6766, and the amended bill passed the same day, 35 Cong. Rec. 6768–6779. On June 14, 1902 the Senate accepted the House amendment without debate. 35 Cong. Rec. 6794. The Senate debate quoted by petitioners (Br. 23–24) thus refers to the original version of Section 8, which included the "States' rights" language subsequently deleted by the House amendment.

State constitutional provisions, the enactment of laws, the adoption of rules and regulations, and the establishment of customs relative to the use of water in irrigation in the arid region" (H.R. Rep. No. 1468, 57th Cong., 1st Sess. 8 (1902). The Report continued and concluded (*id.* at 8–9; emphasis added):

> *The bill recognizes the control of these local laws in matters of recording appropriations of water and in establishing and maintaining the rights of users,* but as the laws of some of the States and Territories involved recognize water rights varying considerably in character, and *it was thought best that the water rights provided under Government works should be of the most ideal character, recognizing clearly the principle of public control over waters used in irrigation,* the rights are made appurtenant to the land irrigated on the basis of beneficial use as the best expression of this principle and as an effectual bar to speculative ownership or control of water.[104]

[104] A similar statement appears earlier in the report. After noting that Section 8 "recognizes State control over waters of nonnavigable streams such as are used in irrigation, and instructs the Secretary of the Interior in carrying out the provisions of the act to conform to such laws" (*id.* at 6), the report notes the purpose of this compliance (*id.* at 7):

"Under this section uniformity of record of the rights is secured and the rules of priorities of rights are not disturbed, while the cost of maintaining the administrative machinery of water distribution is placed on users and the States; the Government is free from all expense or responsibility when projects are completed and paid for."

(This reference to projects being "completed and paid for" apparently refers to Section 6 of the Act, 32 Stat. 389, which imple-

(Continued)

A similar view was expressed by Representative Mondell during the debates in the House. In describing "how the Secretary of the Interior, as the agent of the Government under this act, would proceed" (35 Cong. Rec. 6678), Mr. Mondell stated (*ibid.*):

> It having been ascertained that a sufficient supply of water for the irrigation of the lands in question was available and unappropriated and the feasibility of a project having been determined, the Secretary of the Interior would proceed to make the appropriation of the necessary water by giving the notice and complying with the forms of law of the State or Territory in which the works were located.[105]

(Continued)
ments the congressional policy that reclamation projects should ultimately pay for themselves by providing that "when the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby," except that "the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.") The quoted statement from the Report continues (H.R. Rep. No. 1468, *supra*, at 9):

"The character of the water rights contemplated being clearly defined, the Secretary of the Interior would not be authorized to begin construction of works for the irrigation of lands in any State or Territory until satisfied that the laws of said State or Territory fully recognized and protected water rights of the character contemplated. This feature of the bill will undoubtedly tend to uniformity and perfection of water laws throughout the region affected."

[105] Petitioners emphasize (Br. 26–27) Representative Mondell's quotation of the Republican platform and of a statement by President Roosevelt which, in their view, indicate that Representative

Thus, the House Committee Report states that the bill recognized "the control of these local laws in matters of recording appropriations of water and in establishing and maintaining the rights of users" (p. 135, *supra*), and Representative Mondell noted that the Secretary would refer to the local law "by giving the notice and complying with the forms of law" of the State in which the works were to be located. The legislative history thus provides some support for the contention that the federal government, when acquiring water for reclamation projects, is required—either by Section 8 or by comity—to comply with the forms of state law, including the filing of an application with a state water board for the two purposes of enabling the State to determine whether unappropriated water is unavailable and to give the State notice of the project. But Section 8 was not intended to allow a State to assert control over the operation of a federal reclamation project and to determine the uses of its water, as the state Board is attempting to do here.

Mondell believed that state laws would have a broader role. We have already discussed the President's statement and explained why it does not support petitioners' construction of Section 8 (see note 93, *supra*). In any event, general references to the party platforms and the President's statement were made in the debates primarily to show general support for the enactment of a federal reclamation measure.

Petitioners also rely (Br. 27) on Representative Mondell's discussion of the Mining Acts of 1866 and 1870 and the Desert Land Act of 1977. As noted earlier (pp. 130–132 and note 101, *supra*), this discussion focuses on the introductory language in Section 8, which followed the tradition established in those Acts of recognizing private water rights acquired under the State law.

F. THE ADMINISTRATIVE PRACTICE UNDER SECTION 8 REFLECTS NO RECOGNITION OF ADMINISTRATIVE CONTROL VESTED IN THE STATES

Finally, petitioners contend that the administrative practice of federal agencies under Section 8 supports their claim that it provides for "state control of water" (Br. 36), and they assert that the decisions of the courts below have "altered several decades of settled administrative practice" (Br. 40). The record refutes the suggestion that the United States is urging a novel position or that the balance of federal state relations has been disturbed. As a leading treatise on water law published more than ten years ago stated:

> * * * [T]he Government's present position is that, while it need not comply with state laws, it will participate in state proceedings as a matter of courtesy, and co-operate to the extent that important federal interests are not compromised thereby. [2 Clark, *Waters and Water Rights* § 117.2, p. 175 (1967); footnote omitted.]

The 1975 speech by the Commissioner of Reclamation (A. II, 101–112), which petitioners describe as "[p]erhaps the clearest statement of the historic federal position" (Br. 39), when read in context, likewise shows no federal recognition that state law governs the administration of federal reclamation projects (as opposed to defining proprietary interests). Commissioner Stamm indicated concern regarding "efforts within the State [of California] which appear to have the objective of dictating policies and regulations which would affect the daily operation of Federal

facilities and which would run counter to the authorized functions and obligations of Federal projects" (A. II, 104–105). He continued (*id.* at 105):

> We recognize that the ultimate right to store, divert, and utilize water in accordance with applications made pursuant to State law is one of the key elements of past, present, and future development in the West. Each state has the duty to determine under its own statutes how its unappropriated water is to be used.
>
> Since 1902, the Bureau has consistently taken the position that it will obtain under State law its rights to store and divert water for its projects recommended for Congressional authorization. In fact, water right filings should be made for necessary water rights prior to the conduct of detailed studies, and in most cases this has been done. But certainly the water supply for a given project must be tied down prior to Congressional authorization. It would be foolish to do otherwise. Much time and money could be lost by interim filings.
>
> However, we do maintain the position that once we have filed for water rights pursuant to State law and, through appropriate subsequent proceedings, which vary among States, have obtained the right to use designated blocs of water for designated purposes, the States cannot unilaterally dictate daily operations of the Federal facilities nor unilaterally dictate future changes in authorized uses. Nor could the Bureau adopt changes which would contravene statutory intent or obligation. This

prerogative is reserved to the Congress of the United States.

This statement is fully consistent with the government's position that although Section 8 conveys no administrative control to the States, the Bureau of Reclamation will attempt to comply with the formal requirements of state law in order to give the State notice of the project's water requirements and to permit the State to calculate whether unappropriated water is available to meet them.[106]

Petitioners' description (Br. 36–38) of administrative practice shortly after the passage of the Reclamation Act is likewise consistent with the view that the Bureau attempted to comply with the formal procedures of state appropriation law when possible. The emphasis on compliance with formal filing requirements—*e.g.*, "an application must be made to the State engineer for permission to make an appropriation" (Br. 37)—points up the absence of support for petitioners' contention that the Bureau recognized state law as controlling the administration or operation of federal reclamation projects.[107]

[106] The same is true of other statements petitioners quote (Br. 38), *e.g.*, that "Bureau filings on water are subject to State approval" (95 Cong. Rec. A961 (1949)), and that "the rights of the United States to store, divert, and use water under the law of California * * * have their inception in certain applications by the California director of finance to appropriate unappropriated water, which have been or are to be assigned by him to the United States, [and] in certain applications made by the United States itself." H.R. Doc. No. 416, 84th Cong., 2d Sess. 812 (1956).

[107] The *Proceedings of the First Conference of Engineers of the Reclamation Service*, held in 1904 (A. II, 116–117), cautions that "[b]efore the filing of the first notice of appropriation of water in any state the matter of the advisability of making such filing should be submitted to the chief engineer, because some of the State laws may be such that it is impossible to comply with them in conducting operations under the reclamation act." In the *Proceedings of the Second Conference of Engineers of the Reclamation Service*, held in 1905 (A. II, 118–119), the point was made that "[i]t is important to follow strictly the provisions of law and the local regulations in filing notices of the appropriation," since—"Nothing will be gained by filing these notices unless their form and the subsequent proceedings comply with the provisions of the law, and, accordingly, these matters must be so ordered as to conform to the law and the regulations in all particulars so far as it is possible under the operations of the reclamation act."

The latter proceedings include a survey of state laws (A. II, 119–123), which notes only filing requirements and the time, if any, when work on the project should be begun vis-a-vis the filing date. These references to the state law provisions regarding the time of construction were relevant to determining when a filing should be made and whether there might be a need to amend or renew a filing.

The record thus supports the district court's conclusion (A. I, 88–89) that "all the administrative statements and actions are consistent with the view that the Bureau does and will respect existing state water laws and further, that the Bureau does and will comply with state filing requirements *on the basis of comity.*"

V

Petitioners' Claims of Estoppel Are Without Merit

Petitioners make three arguments in the nature of estoppel. In general, they claim that even if federal law normally prevents the Board from imposing on a federal reclamation project the conditions imposed by Decision 1422, the United States is estopped from

challenging those conditions in this case. The arguments rely on collateral estoppel (Br. 65–67), on equitable estoppel (Br. 68–70), and on the contention that the United States is bound to comply with permit conditions where the applications for the permits were assigned to the Bureau of Reclamation by the State Department of Finance (Br. 70–73). None of the arguments has merit.

A. COLLATERAL ESTOPPEL DOES NOT BAR THE UNITED STATES FROM CHALLENGING THE CONDITIONS IMPOSED BY THE BOARD ON THE NEW MELONES PROJECT

Petitioners assert that "[t]his Court must conclude, as a matter of law, that the conditions of Decision 1422 are not inconsistent with the purposes of the New Melones Project" (Br. 65), because the United States did not seek review of Decision 1422 in the California courts and "[a]ccordingly, the doctrine of collateral estoppel bars the United States from now challenging the validity of the findings" (Br. 66). This argument was rejected by the district court (A. I, 90–92), and, for several reasons, this Court should reject it as well.

First, assuming *arguendo* that the doctrine of collateral estoppel applies to the United States in this case with respect to the conditions imposed by the Board, petitioners' argument must fail because the substantive requirements of the doctrine are not met. The party asserting collateral estoppel must show that the issue in the current action is identical with

the issue that was litigated and determined in the earlier action. See *United States* v. *International Building Co.*, 345 U.S. 502, 504–505; 2 Davis, *Administrative Law Treatise* § 18.04, p. 569 (1958). Here, the issue on which petitioners assert the United States to be collaterally estopped by the decision of the State Board is "that the conditions of Decision 1422 are not inconsistent with the purposes of the New Melones Project" (Br. 65; see also *id.* at 66–67). In fact this issue was not decided by the Board. Nowhere in Decision 1422 did the Board address or decide the question whether the conditions it imposed were consistent with the purposes of the project.[108]

[108] In an effort to bridge the gap between the Board's decision and the issue presented here, petitioners claim that the Board decided "that the Bureau had not shown a 'beneficial use'" (Br. 66), and that since Section 8 of the 1902 Reclamation Act "expressly provide[s] that a water right exists only to the extent that the water is put to a 'beneficial use'" (*ibid.*), the issue decided by the Board was whether the Board's conditions were consistent with the congressional purposes. "In short, Congress, in authorizing the New Melones Project, did not intend for water to be impounded until a 'beneficial use' was shown, and the State Board's findings, that the Bureau has not shown a 'beneficial use', are final." Br. 66.

This reasoning has at least two flaws. Nowhere in its decision did the Board decide "that the Bureau had not shown a 'beneficial use.'" The standard applied by the Board was whether the intended use would be "reasonable, beneficial and *in the public interest*" (A.II, 21; Board's emphasis). It was because "the public interest requires" (A. II, 24, 31), and because of "the maximum public benefit and maximum utilization of the available resources in the public interest" (*id.* at 32), that the Board imposed its conditions against impoundment of the reservoir. Second, even if the Board had decided the "beneficial use" question, that issue of state law would not be identical, for collateral estoppel purposes, with

(Continued)

But even if the state Board had made the finding that petitioners claim it made, the doctrine of collateral estoppel would not bar the United States from obtaining a federal court determination of the issue here. The United States contends that by virtue of federal law the Board had no authority or jurisdiction to impose any conditions on the permits it granted for this federal project, and certainly that it had no authority or jurisdiction to impose conditions inconsistent with the federal purposes of the project. If either contention is correct, it follows, as the district court held (A. I, 91–92), that the Board was not a "court of competent jurisdiction" for the purpose of imposing the conditions that the United States attacks here, and hence that the United States was not required to "pursue California appellate remedies, but rather, could appropriately turn to a federal court in a declaratory relief action for the purpose of interpreting and clarifying federal law" (*id.* at 92). Decisions of this Court, even in the context of federal administrative agencies, agree that an agency decision rendered without authority has no collateral estoppel effect. *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535; *Borax*

(Continued)
the issue of federal law presented by the same language in the Reclamation Act (see 2 Davis, *supra*, § 18.04, at 577–578), especially in the absence of any indication that the state Board considered itself to be interpreting the federal statute or deciding a question of federal law.

Consolidated, Ltd. v. *Los Angeles*, 296 U.S. 10. See 2 Davis, *supra*, § 18.07, at 596–597.[109]

The United States made it clear to the state Board in this case, and the Board recognized, that the United States was not conceding any authority on the part of the Board to impose conditions on a federal project and was reserving its right to challenge any conditions the Board imposed.[110]

[109] The cases cited by petitioners (Br. 66–67) as applying collateral estoppel to decisions of administrative agencies do not involve, and often expressly distinguish, questions of the agency's jurisdiction; in addition, they involve agency determinations of *disputed issues of fact*, in contrast to the question of law presented here as to the consistency of the Board's conditions with the purposes of the project (petitioners' references to the Board's "factual findings" (Br. 66) notwithstanding). Thus, in *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (cited by petitioners at Br. 66), the Court said it was dealing with "an administrative agency [which] is acting in a judicial capacity and *resolves disputed issues of fact properly before it* * * *," and referred twice more to "factual disputes" (384 U.S. at 422; emphasis added). In *United States* v. *Fallbrook Public Utility District*, 165 F. Supp. 806 (S.D. Cal.) (cited by petitioners at Br. 66), a determination by the California State Water Board on the factual issue of priority of use was held not subject to collateral attack by the United States, but the court stated: "[I]f the board has acted within its jurisdiction, its decisions are not subject to *collateral attack* * * * " (165 F. Supp. at 857; emphasis in original). (Also, the United States stipulated in that case that state law would control and that the sovereignty of the United States was not involved. *Id.* at 816.)

[110] The opening brief of the United States before the Board stated (A. II, 86): "Under the law as declared by the courts the Board's function becomes ministerial. It must determine whether unappropriated water exists. A permit for the unappropriated water then follows as a matter of course."

At the Board's hearing, counsel for the Contra Costa Water Agency moved for a 30-day suspension during which "the U.S.

(Continued)

The claim that the United States is nonetheless collaterally estopped by the Board's decision imposing such conditions, and deprived of its right to challenge the Board's authority in federal court, is a circular

(Continued)
Bureau of Reclamation will be required to enter into an appropriate stipulation with this board * * * to the effect that it will be bound by any terms and conditions incorporated in any permit issued herein; and * * * that if it does not enter into such a stipulation * * * that this proceeding be dismissed." Tr. 15–16. The moving counsel explained: "It's unnecessary, of course, to elaborate on the proposition that the United States of America has taken the position unequivocally to the effect that they are not bound by any terms and conditions in any permits issued by this board." *Id.* at 16. Counsel for the Board (Mr. Craig) opposed the motion on the ground "that the board does not have the power to require the Bureau or the United States to enter into any such stipulation, and we have every reason to believe that if the board made the order that is requested, that the result would be that these proceedings would be terminated." *Id.* at 17. He added: "Now, the question that we are interested in—the authority of the board is going to be determined in the court. It can't be determined here, we know * * *. * * * It seems to me that * * * it would be much better to proceed, have the board make its decision, and if it is challenged, then it would be, of course, litigated in the courts * * *." *Id.* at 17–18. The Board's presiding officer denied the motion. *Id.* at 18. The motion was later renewed in a brief to the Board, which held in Decision 1422 that it had been "properly denied" (A. II, 12).

Petitioners state (Br. 15, 66) that "the United States conceded below, in oral argument, that it cannot contest the validity of the [Board's] findings," citing a statement to that effect by Judge Wallace (A. I, 36 n. 1). We are informed by the clerk of the court of appeals that its recording of the oral argument has been routinely erased. The attorney who argued the case for the government in the court of appeals does not believe that he made any such concession, which would have been inconsistent with the government's brief in the court of appeals (authored by the same attorney). The brief attacked "the argument by the State that Decision 1422 is binding" as "an exercise in circular reasoning," and stated: "Even if the United States could have voluntarily

argument that effectively concedes to the Board some of the authority at issue. If federal law precludes any Board decision imposing conditions on federal permits, the United States, merely by seeking a permit from the Board, should not be held to have submitted to any decision-making power of the Board with respect to such conditions. Cf. *Dugan* v. *Rank*, 372 U.S. 609; *Minnesota* v. *United States*, 305 U.S. 382, 388–389. Such a result would be inconsistent with the principle that even a private party who is entitled to have a case determined by a federal district court may not be compelled, without fault or consent, to accept a state court's determination instead. See *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411.[111]

B. THE EQUITABLE DOCTRINES OF ESTOPPEL, ELECTION, AND WAIVER DO NOT BAR THE UNITED STATES FROM CHALLENGING THE CONDITIONS IMPOSED BY THE BOARD

Petitioners next contend (Br. 68–70) that "the equitable doctrines of estoppel, and election and waiver" require the United States to comply with State-imposed conditions when it acquires water per-

been a party in this case, the federal representatives objected to any procedure other than ministerial issuance of a permit, and cannot be bound by other proceedings without any federal consent." Brief for the United States in the Court of Appeals, June 1976, at 13.

[111] Consistently with the *England* decision (see *id.* at 420–422), the United States made it clear here (see note 110, *supra*) that in seeking permits from the Board it was not consenting to any authority of the Board to determine any federal question with respect to the imposition of conditions on the permits.

mits under state law. The contention was appropriately rejected by the district court (A. I, 89–90).

Assuming *arguendo* that equitable estoppel could be applied to the United States in a context such as this (but see, *e.g., United States* v. *California,* 332 U.S. 19, 40), there is no basis for its application on these facts. As the district court pointed out, the disagreement between the United States and California concerning the Board's authority to impose conditions on federal permits—a disagreement well known to the Board in this proceeding, see note 110, *supra*—precludes application of the estoppel notion "that the United States 'knew' the true facts and thereby 'induced' California to engage in detrimental conduct" (A. I, 90). If the United States receives benefits by obtaining permits under the State's appropriation laws, as petitioners contend (Br. 69–70), but is not legally required to submit to conditions imposed on those permits, and all parties are aware of their respective legal rights and claims, equity does not require that the law be different.[112] This argument, too, is circular. It begs the legal question whether federal reclamation projects may indeed be subjected to State-

[112] Petitioners' argument appears identical to the motion that would have terminated the Board's proceeding unless the United States agreed to be bound by any conditions imposed by the Board on permits it issued. See note 110, *supra.* As the proponent of the motion argued (Tr. 18): "[I]t seems utterly unfair to us * * * for the government to come in and seek water rights * * * and those permits in one breath and then to say in the next that the government is not bound by any terms and conditions * * *." The Board, a petitioner here, held that the motion had been "properly denied." A. II, 12.

imposed conditions because the United States seeks appropriation permits from the State Board.

C. THE UNITED STATES IS NOT REQUIRED TO COMPLY WITH PERMIT CONDITIONS BECAUSE THE APPLICATIONS FOR THE PERMITS WERE ASSIGNED TO THE UNITED STATES BY A STATE AGENCY

Finally, petitioners contend (Br. 70–73) that the United States must in any event comply with conditions imposed on permits issued to the United States by the state Board where the applications for the permits were filed originally by a state agency and then assigned to the United States.[113] This argument was duly rejected by the court of appeals on petition for rehearing (A. I, 38–41). As the court pointed out, relying on "California law" (*id.* at 38), the assignment to the Bureau "was of an application, not of a permit containing conditions," and the application carries no rights vis-a-vis the State (*id.* at 38–40). Hence after the Bureau became the assignee, "it was acting in the same capacity as when it filed its own applications" (*id.* at 40). It is true, as petitioners emphasize (Br. 71), that the application assigned to the Bureau carried an earlier priority date, but there is no reason why the earlier priority obtained through assignment of the application should subject the Bureau to permit conditions to which it would otherwise be immune. As the court of appeals stated (A. I, 40), "[t]here is no contention that the assignment was ex-

[113] The State Department of Finance filed the applications, of course, in anticipation of the New Melones Project and in order to protect a priority date for appropriation of the necessary water. See A. II, 47–48, 55–56.

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pressly conditioned upon acceptance of whatever permit conditions the State might impose." [114]

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted.

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[114] This fact distinguishes petitioners' hypothetical case (Br. 72) of a federal agency purchasing from a State an option to buy a building "on condition that the federal agency comply with the state's zoning laws."

Petitioners reply (Br. 73 n. 51) that "the assignments did not become effective until their approval by the State Board, at which time the State clearly expected the Bureau to comply with the conditions therein," for which they cite Defendents' Exhibit 4. A. II, 69–71. This is a 1967 letter from the Bureau to the Board simply requesting assignment of the applications. It provides no apparent support for petitioners' statement about what the State expected at the time the assignments were approved by the Board in 1973, or at any other time. The position taken by the United States before the Board (see note 110, *supra*) would seem to have warranted a different expectation.

APPENDIX A

COMMENTS OF THE STATE OF CALIFORNIA

THE RESOURCES AGENCY OF CALIFORNIA, DEPARTMENT OF WATER RESOURCES

April 20, 1962.

Lieut. GEN. WALTER K. WILSON, JR.,
Chief of Engineers, Department of the Army,
Washington, D.C.

Subject: Your File No. ENGCW-PD

DEAR GENERAL WILSON: Your proposed report entitled "Review Report for Flood Control on New Melones Project, Stanislaus River, California" was transmitted on January 4, 1962, to the Department of Water Resources, State of California, for review and comments in accordance with the provisions of Public Law 534, 78th Congress, and Public Law 85–624. The views and recommendations of the Department of Water Resources on your report, together with the comments of the Department of Fish and Game, the Division of Highways, the State Reclamation Board, and the Department of Conservation are set forth in the attached report entitled "Review by State of California of Proposed Report of Chief of Engineers, United States Department of the Army, on New Melones Project, Stanislaus River."

The New Melones Project, as proposed in your report, would include a 600-foot earth and rockfill dam on the Stanislaus River, creating a reservoir with a

storage capacity of 2,400,000 acre-feet, and a hydroelectric powerplant with an installed capacity of 150,000 kilowatts, located immediately below the dam. The project would be operated for full development and optimum utilization of the water resources of the lower Stanislaus River as well as to provide an adequate degree of flood protection to lands located along the Stanislaus and lower San Joaquin Rivers. Estimated cost of the project facilities is about $114,000,000.

It is concluded in the State's report that the New Melones Project is economically justified and would provide optimum multipurpose development of the waters of the lower Stanislaus River. Furthermore, it is recommended that the Congress authorize the New Melones Project for construction and operation by federal agencies subject to certain provisions specified in the State's report.

I concur in the conclusions and recommendations contained in the State's report and request that this report be considered as expressing the official views and recommendations of the State of California with respect to the proposed New Melones Project.

Sincerely yours,

/s/ WILLIAM E. WARNE,
Director.

Attachment.

REVIEW BY STATE OF CALIFORNIA OF PROPOSED REPORT OF THE CHIEF OF ENGINEERS, UNITED STATES DEPARTMENT OF THE ARMY, ON NEW MELONES PROJECT, STANISLAUS RIVER

INTRODUCTION

By letter dated January 4, 1962, the office of the Chief of Engineers, U.S. Department of the Army,

transmitted to the Department of Water Resources, State of California, its proposed report entitled "Review Report for Flood Control on New Melones Project, Stanislaus River, California" for review and comment in accordance with the provisions of Public Law 534, 78th Congress and Public Law 85–624. Included with the report of the Chief of Engineers were reports of the Board of Engineers for Rivers and Harbors and of the District and Division Engineers. For the sake of brevity, the "Review Report for Flood Control on New Melones Project" will be referred to hereinafter as the "New Melones Report."

The New Melones Project was authorized by the Flood Control Act of 1944 at a storage capacity of 450,000 acre-feet, with provisions for possible future enlargement to 1,100,000 acre-feet. Further studies of this project by the U.S. Bureau of Reclamation including those for the contemplated East Side Division of the Central Valley Project resulted in a joint investigation by the Corps and the Bureau of the economic justification of a project with reservoir storage capacity greater than 1,100,000 acre-feet. As a result of this joint investigation, larger storage capacity was found to be desirable. The Appropriations Committees of the Senate and House of Representatives authorized an investigation of Melones Reservoir with storage capacity greater than 1,100,000 acre-feet in October 1959. The review report on New Melones Project is a result of that joint investigation.

According to the information presented in the New Melones Report, on the basis of comparison of incremental benefits with incremental costs, New Melones Reservoir with a storage capacity of 2,400,000 acre-feet would be economically justified. This amount of storage capacity would also provide for full develop-

ment of the lower Stanislaus River. A new powerplant, with an installed capacity of 150,000 kilowatts, would be included as part of the project and would provide a large portion of the project benefits.

It is stated in the New Melones Report that New Melones Reservoir with a storage capacity of 2,400,000 acre-feet, when integrated with the contemplated East Side Division of the Central Valley Project, would provide additional average annual new water supplies of about 261,000 acre-feet measured at the service area. This service area, for the purposes of economic analysis, was assumed to be in the water deficient San Joaquin Valley.

The estimated average annual primary benefits of the New Melones Project as presented in the New Melones Report are as follows:

Flood Control	$1,030,000
Irrigation	4,443,000
Power	3,993,000
Recreation (including fish and wildlife)	350,000
Total	$9,816,000

The estimated first cost of the New Melones Project is $114,000,000 with a corresponding annual cost of $6,223,000. The ratio of benefits to costs is 1.6 to 1.

COMMENTS OF DEPARTMENT OF WATER RESOURCES

The Department of Water Resources has a direct interest in all projects involving the development of water resources within the State. Of particular interest is the extent to which these projects are compatible with the comprehensive plan for the general and coordinated development of the water resources of California.

The California Water Plan

Optimum multipurpose development of the New Melones Reservoir site on the Stanislaus River should be made for the purposes of flood control, water conservation, hydroelectic power production, recreation, and fish and wildlife. There is a particularly urgent need for flood control protection to lands located along the Stanislaus and lower San Joaquin Rivers.

At a public hearing on the New Melones Project conducted by the U.S. Corps of Engineers and Bureau of Reclamation in Modesto on October 17, 1960, local interests from Tuolumne, Calaveras, Stanislaus, and San Joaquin Counties generally joined in urging a delay of at least a year in further formulation of the project to allow time for completion of studies of possibilities for development of the waters of the Stanislaus River by local interests. Subsequently, the Stanislaus River Basin Group, composed of Calaveras County Water District, Tuolumne County Water District No. 2, Oakdale Irrigation District, and South San Joaquin Irrigation District, completed a report entitled "Report and Development Plan, Stanislaus River Basin Area" dated October 1961. The department has received this report and is aware of the differences in the plans to develop water at the Melones site as proposed by the Stanislaus River Basin Group with the plans as proposed by the Corps of Engineers. The principal difference is that the Stanislaus River Basin Group proposed to construct New Melones Reservoir with storage capacity of 1,100,000 acre-feet, and the Corps has proposed storage capacity of 2,400,000 acre-feet.

While it is generally desirable to have local development of water to satisfy local needs, it is also desir-

able to obtain optimum development of the water resources of the State. It is noted that the department has not made independent sizing studies of New Melones Reservoir integrated with the Central Valley Project. However, such studies made by the Corps and by the Bureau have been reviewed, and it appears that a multi-purpose reservoir with a storage capacity of 2,400,000 acre-feet at the New Melones site would optimize development of the waters of the Stanislaus River.

The comments of the Department of Water Resources of December 9, 1960, on the draft report of the Corps has been appended to the New Melones Report. However, the portion of these comments pertaining to water rights of counties of origin have not been discussed in sufficient detail in the text of the New Melones Report to indicate concurrence by the Corps. The State has filed several applications for water rights on the Stanislaus River. The first of these were Applications Nos. 5648 and 5649, filed in 1927 specifying a service area within or adjacent to the Stanislaus River drainage basin. Under existing state water law, counties of origin cannot be deprived of any water required to supply their needs by projects operating under these applications. The proposed project would be considered substantially in conformance with The California Water Plan if it were agreed that water would be made available to the counties of origin whenever needed, as specified in water rights Applications Nos. 5648 and 5649.

Service Area

The department agrees that there is a present need in the San Joaquin Valley for all of the water that could be made available from the New Melones Project. For the purposes of the operation studies presented in the New Melones Report, future upstream depletion of the waters available to New Melones Reservoir was estimated to increase to about 60,000 acre-feet annually in the next 50 years. When the State reviewed the draft report of the New Melones Project in December 1960, the future upstream depletion of the waters of the Stanislaus River were estimated to be from about 100,000 to 120,000 acre-feet annually greater than current depletions on the basis of including service to the Hogan Service Area. This service area is located between the Calaveras and Mokelumne Rivers, east of the service area of the Folsom South Canal, and below New Hogan Dam. It has been determined from further study, that this service area could best be served by means of an exchange of water from New Hogan Reservoir and from the proposed Folsom South Canal. Therefore, it is believed that the amount of the future upstream depletion stated in the New Melones Report is reasonable.

As stated in the New Melones Report, water-deficient areas in the San Joaquin Valley to the south of the Stanislaus River could fully utilize the new yield from the New Melones Project. However, there also is need to supply water to the Bachelor Service Area located above the service area of the Folsom South Canal between the Stanislaus and Calaveras Rivers, and below the New Melones Damsite. This area conveniently and logically could be served with water from the New Melones Project and was proposed to be provided water from the Stanislaus River under Applications Nos. 5648 and 5649. It is estimated that the annual water requirement of the Bachelor Service Area during the next 50 years will increase to about 160,000 acre-feet. It is realized that, as an al-

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ternative, this area could be served water from the proposed Folsom South Canal. But, because of the pump lifts involved, it is believed that the Bachelor Service Area should be served water from the Stanislaus River.

Irrigation Benefits

Irrigation benefits that would be realized from the proposed project were evaluated without determining the irrigation yield from the New Melones Project when integrated with the Central Valley Project. However, studies made by the Bureau and the Corps of an integrated operation were reviewed. For the purposes of the New Melones Report, operation criteria included (1) estimates of future upstream depletion of water supply of about 60,000 acre-feet, (2) minimum streamflow in the Stanislaus River below Goodwin Diversion Dam for fishery maintenance of 100 to 200 cubic feet per second, and (3) present demands for irrigation water in the South San Joaquin and Oakdale Irrigation Districts.

To evaluate project irrigation benefits, the Bureau selected the Kaweah Delta in the San Joaquin Valley as the project service area for irrigation water because this area was considered to be reasonably typical of the area of the contemplated East Side Division by virtue of its central location and representative cropping pattern. Farm budgets used in the economic analyses included those for field crops, feeder beef, dairy, grapes, and peaches.

As described in the New Melones Report, the New Melones Project, by virtue of its integration with the Central Valley Project, could provide a new average annual yield of 261,000 acre-feet of water to presently unirrigated lands in the Kaweah Delta portion of the

San Joaquin Valley. The annual irrigation benefits would be about $8,202,000 measured at the place of water use. These benefits, including those accruing from ground water recharge and savings in pumping costs, were projected back to the reservoir by deduction of costs of the conveyance and distribution systems. The annual primary irrigation benefits creditable to New Melones Project, therefore, would be $4,443,000 measured at the reservoir. While no specific estimates of benefits accruing to ground water recharge or savings in pumping costs were made in reviewing the New Melones Project, it is believed that the irrigation benefits as shown in the report are reasonable. As stated in the New Melones Report, additional studies would be required to determine which of the possible alternative service areas should be served new irrigation water from the project. It is again noted, however, that the Bachelor Service Area would be a logical area to receive project water from the Stanislaus River.

Power Benefits

The New Melones Report states that due to the increasing demand for power in Northern California, power output from the New Melones Project could be readily absorbed into the power market area. In general, it is agreed that this conclusion is correct. However, it may not be practical by the year 1969 for the Northern California system to absorb power at the capacity factor assumed in the New Melones Report. The physical limitations and contract requirements pertaining to certain powerplants, limit the flexibility with respect to capacity factors, for proposed hydroelectric powerplants in Northern California.

If proposed hydroelectric generating capacity as presently contemplated by the various private, local, state, and federal agencies is constructed, there are indications that some of this new hydroelectric capacity may not be fully useful in meeting the area load during early spring months. The Bureau of Reclamation has stated that a rather flexible mode of water releases and project operation would be permissible for the New Melones Project, when operated in connection with the irrigation purpose of the contemplated East Side Division. In that case, a minimum power generation schedule for New Melones should probably be adopted which would permit optimum integration of the existing and proposed generating facilities.

The New Melones Report states that the optimum size of the project powerplant would be selected after more detailed studies conducted in cooperation with the Federal Power Commission and other interested agencies. These additional studies are desirable, and the project powerplant capacity should be selected after review and agreement of all interested agencies concerning the dry-period operation study and the minimum generation schedule.

The Corps assumed that the operation of the New Melones Powerplant would be integrated with the operation of other powerplants of the Central Valley Project. Power operation criteria was based on an extension of agreements between the Pacific Gas and Electric Company and the U.S. Bureau of Reclamation, similar to the present contracts. Under these assumptions, a dependable capacity of 119,000 kilowatts as stated in the report, is reasonable. However, a review of the present contracts does not appear to

justify the criteria used in preparing the dry-period power operation study. There is no evidence available that the Pacific Gas and Electric Company has accepted this criteria for all future additions to the Central Valley Project. The criteria used for the power operation study of the New Melones Report, therefore, may not be realistic.

Flood Control Benefits

From a review of the flood control data and benefits presented in the New Melones Report and discussions with the Sacramento Division, Corps of Engineers, the estimated average annual flood control benefits of $1,030,000 appear to be reasonable. This value is based on providing protection to an area of 270,000 acres, with a mean annual benefit value of $3.81 per acre.

Recreational Benefits

Estimates of recreational benefits presented in the New Melones Report are based on an estimated number of visitor-days of use and an estimated value of a visitor-day of use.

It is believed that New Melones Reservoir would afford substantial recreation potential regardless of the anticipated fluctuations of the water level of the reservoir. The New Melones Report shows projected total annual recreational use in the New Melones area, including fishing use, of 400,000 visitor-days initially, increasing to 800,000 visitor-days ultimately. Preliminary studies conducted for the review of the New Melones Report indicate that initial and ultimate recreation use in the order of 1,200,000 visitor-days and 2,400,000 visitor-days respectively, are more realistic estimates.

The New Melones Report notes that the National Park Service has estimated recreational benefits at $1.60 per visitor-day, and that the U.S. Fish and Wildlife Service has suggested the use of $5.80 per angler-day. However, as presented in the New Melones Report, in the interest of conservation, recreational benefits have been estimated at $0.50 per visitor-day. Studies by the Department of Water Resources in somewhat similar areas have indicated that a value of from $1.00 to $2.00 per visitor-day is warranted.

The New Melones Report shows a need for an acquisition of approximately 1,500 acres of land for initial public recreational development and for access and protection zones. The cost of such land acquisition would be borne by the federal government. The National Park Service, in their study for the purposes of the New Melones Report, stated that about 1,500 acres of land for initial recreational development and an additional area of approximately 2,675 acres to accommodate the recreation needs for the balance of the repayment period would be required. They further stated that the latter land acquisition should be the responsibility of the agency administering the project recreational area. However, President Kennedy, in his 1961 message on natural resources, stated that steps should be taken to "* * * insure that land acquired for the construction of federally financed reservoirs is sufficient to permit future development for recreational purposes." This policy has been adopted by the Departments of the Army and the Interior. It is believed, therefore, that the additional 2,675 acres of land necessary for future recreational development should be acquired concurrently with acquisition of all other project lands.

Insufficient detail was presented in the New Melones Report to evaluate the adequacy of public use facilities for recreational development. It was stated that it would be desirable for local interests to operate and maintain the recreational developments. This decision should receive serious consideration and coordination with the proper agencies as project plans are developed.

General Design and Project Costs

The design and estimates of cost of the New Melones Project presented in the New Melones Report were reviewed and a cursory field inspection was made of the project site. Additional design and hydrologic information was obtained from the Corps, the Bureau, and the U.S. Weather Bureau.

It is concluded that the foundation of New Melones Damsite is suitable for a rockfill enbankment with a height of over 600 feet and that the embankment slopes shown in the New Melones Report are adequate. Moreover, the proposed diversion and outlet structures also are believed to be adequate. However, geologic studies indicate that the foundation rock in the area of the proposed spillway cut is not competent for an unlined spillway or for cut slopes of ¼ to 1. There are several zones of weak rock which intersect the chute alignment. Even under the moderate flows resulting from use of the spillway for flood control releases, these zones would be expected to erode severely. During times of larger releases, these areas of weak rock would be susceptible to washouts. In view of the foregoing, it is believed that consideration should be given to modifying the spillway design.

The estimates of total project cost presented in the New Melones Report appear to be reasonable.

Upper Basin Features of the New Melones Project

There are several possible water conservation facilities in the upper basin which would optimize the development of the Stanislaus River and would develop water for local upstream use in Tuolumne and Calaveras Counties. These projects would be desirable additions to the New Melones Project. The Bureau of Reclamation currently is studying possibilities for providing water to the Sonora and Keystone Service Areas in Tuolumne County. Past studies of these service areas have indicated that an enlargement of the existing Phoenix Reservoir on Sullivan Creek, and increased diversions of water from the South Fork Stanislaus River to this reservoir, offers the best solution to satisfying present and immediate future water needs of the Sonora and Keystone Service Areas. A firm annual yield of water in the amount of about 30,000 acre-feet could be realized by enlarging Phoenix Reservoir from its existing storage capacity of 850 acre-feet to a storage capacity of 25,000 acre-feet.

Recent studies by the department indicate that there are several possibilities for supplying the water needs of Calaveras County. Local water supplies could be developed for the West Point area by providing small storage reservoirs on Forest Creek, Hunter Creek, and the Middle Fork of the Mokelumne River. New storage on the South Fork Mokelumne River, North Fork Calaveras River, and Jesus Maria Creek operated in conjunction with water diverted from North Fork Stanislaus River would satisfy the needs of the San Andreas and Mokelumne Hill areas.

These local sources of water from tributaries of the Mokelumne and Calaveras Rivers, would not be adequate to supply present and immediate future water needs of upper Calaveras County. The only logical supplemental source of water which could be utilized to supply this area is the North Fork of the Stanislaus River. Provisions could be made to convey a firm annual yield in the amount of about 30,000 acre-feet from the North Fork of the Stanislaus River into the Calaveras River basin for consumptive use purposes. This amount of water plus additional supplies for hydroelectric power production could be diverted through a proposed system of storage and conveyance works consisting of Spicer Meadows Reservoir on Highlands Creek and a conveyance conduit extending down the ridgetop located between Stanislaus and Calaveras River Basins. Hydroelectric power would be developed enroute at three sites near White Pines, Avery, and Stanislaus.

COMMENTS OF RECLAMATION BOARD

Mr. Robert W. James, General Manager and Chief Council of the Reclamation Board, by letter dated March 13, 1962, submitted the following comments.

> The flood control aspects of this project are urgently needed to increase the degree of flood control protection for the portion of the San Joaquin River Project levees along the Stanislaus River and the downstream reaches of the San Joaquin River. We feel that completion of this unit of the over-all San Joaquin River Flood Control System will add an important link to the project. We therefore urge that construction be initiated as soon as possible in order to add substantially to the flood control protection for the downstream levee system.

The comments of the Board of Engineers for Rivers and Harbors provide that local interests shall agree to maintain the existing levees of the Stanislaus River Channel from Goodwin Dam to the San Joaquin River so as to preserve a safe carrying capacity for that reach of at least 8,000 cubic feet per second. It is also noted that the flood control operation of the project is to be accomplished in accordance with the rules and regulations prescribed by the Secretary of the Army.

It is our understanding that no actual surveys were made of the existing levees and channels downstream from Goodwin Dam. The estimation that the existing levees and channel would be adequate for a flow of 8,000 cubic feet per second was based on observation only. In view of the open-ended obligation that this requirement could place on local interests, it is recommended that when the project design is started actual surveys be taken of the channel and levees involved and hydraulic computations be made to determine whether or not the levees are adequate both as to cross section and freeboard. If they are not, it is recommended that additional work be included in the Corps' construction contract to clear the channel and to bring the levees up to grade and section, to adequately contain a flow of 8,000 cubic feet per second.

It is also requested that the levees be widened if necessary and that a patrol road be constructed thereon by the Corps of Engineers so that adequate maintenance can be performed. This would involve the acquisition of necessary rights of way for this purpose. If this procedure is not followed, it would not be possible for any public district to give assurances that the levees

will be maintained in accordance with the requirements of the Secretary of the Army since adequate maintenance could not be performed without a patrol road. It also would not be possible to guarantee that any public district would have access to these levees without acquisition of whatever rights of way will be required for the purpose. At the present time, these levees are in private ownership and the owners thereof could deny access to the levees if they should so desire.

COMMENTS OF DEPARTMENT OF FISH AND GAME

Mr. Harry Anderson, Deputy Director of the Department of Fish and Game, interdepartmental communication dated March 12, 1962, submitted the following comments.

> Since the preliminary report was submitted for review we have had the opportunity to give greater consideration to all aspects of this project. The recommendations which follow parallel our previous recommendations but enlarge on them and provide greater detail. These comments and recommendations supersede all previous recommendations and constitute the official comments of this Department pursuant to P.L. 85–624, the Wildlife Coordination Act, and the general policy of the State regarding the protection and enhancement of fish and wildlife.
>
> Our review indicates that the Corps has not separated general recreational benefits from fish and wildlife benefits and the benefits assigned appear to be low. We believe the fish, wildlife and recreational benefits should be re-evaluated and raised.

On page 29, the report states "Hunting, trapping and related use of the general area has not been evaluated; however, any change in use due to the project is believed to be small and would not affect the overall recreation accomplishments of the project." We are not certain of the origin of this statement, but our investigation of the project reveals that a substantial amount of wildlife habitat will be inundated, or lost through changed land use patterns. These losses should be mitigated and recommendations are included for this purpose.

The Department investigated this project jointly with personnel of the Office of River Basin Studies, Fish and Wildlife Service, and in general concurs with their evaluation regarding benefits to improved anadromous and warm water fisheries. Our recommendations parallel those of the Fish and Wildlife Service.

Recommendations

1. In line with recent policy of the Department of Interior and the Wildlife Coordination Act, conservation and development of fish and wildlife resources should be included and authorized as project purposes.

2. That the Corps and the Bureau respectively provide the storage for and obtain the necessary water rights to, the quantities of water hereafter prescribed for the maintenance and enhancement of fishlife in the Stanislaus River; from Goodwin Diversion Dam, or if constructed, the proposed Knights Ferry Diversion Dam, to the confluence of the San Joaquin River; and that said water be released in accordance with the following schedule:

Period	Flow in cubic feet per second	
	Normal year	Dry year [1]
October 1 to December 31	200	150
January 1 to May 31	125	100
June 1 to September 30	100	50

[1] A Dry year is defined as one in which the natural inflow into Shasta, Trinity, Folsom, and Friant Reservoirs, as predicted for the water year, totals less than 5,000,000 acre-feet, or one in which the combined water storage in Shasta, Trinity, Whiskeytown, Folsom, Auburn, and New Melones Reservoir as predicted for the water year, is less than 5,000,000 acre-feet.

Provided: that if the average streamflow maintained in the Stanislaus River from October 1 to December 31 is greater than the minimum flow specified for this period (exclusive of flood spill and emergency releases) the streamflow from January 1 to May 31 be maintained at not less than the specified January 1 to May 31 minimum flow, or the average of the October 1 to December 31 flow minus 100 c.f.s. whichever is greater. *Provided further:* that fluctuations of the Stanislaus River downstream from Goodwin Diversion Dam be limited to a rate of change not exceeding 2 inches per hour or 8 inches in any 24-hour period.

Provided further: that during the period of October 1 to December 31 the water surface elevation not be reduced by more than 4 inches from elevations reached during flows in excess of those recommended (exclusive of flood spills and emergency releases). Water surface elevations shall be measured at Orange Blossom Bridge.

Provided further: that flow releases into the channel of the Stanislaus River downstream from the Goodwin Diversion Dam be derived from New Melones Reservoir outlets at or near elevation 560 feet m.s.l.

Provided further: that modifications of the above streamflow schedule, within the limits of the total quan-

tities of water involved, be permitted upon request of the California Department of Fish and Game and the Bureau of Sport Fisheries and Wildlife if found desirable for optimum fishery production and permissable [*sic*] without infringing upon prior project commitments.

Provided further: that upon request of the California Department of Fish and Game and the Bureau of Sport Fisheries and Wildlife flows be released into the channel of the Stanislaus River in sufficient quantity to flush from salmon and trout spawning areas any silt, fines, and other debris that may have been deposited as a result of project operation. If mechanical means are used in place of, or in addition to, flushing flows, the associated costs shall be a project cost.

3. That a minimum pool of 300,000 acre-feet of water be reserved in the reservoir for development of a reservoir fishery, wildlife conservation and general recreation purposes. Rapid and extreme fluctuations are to be avoided insofar as is consistent with project purposes, particularly during the fish spawning season, April through June.

4. Reservoir clearing plans be developed in cooperation with the Department of Fish and Game and U.S. Bureau of Sport Fisheries and Wildlife.

We believe about 2,500 to 3,000 acres of trees and brush could be retained in the reservoir area without affecting adversely other uses, and which will be highly beneficial to fish and small game. If left intact this could result in a savings of clearance costs on the order of $425,000 to $525,000 ($175.00 per acre) which could be applied to land acquisition for wildlife mitigation, and public access and recreation.

5. Acquisition by fee-title or easement of approximately 3,400 acres of privately owned riparian land along the Stanislaus River downstream from Knights Ferry Bridge. Under a general plan this riparian land would be devoted to management for fish and wildlife purposes to mitigate wildlife damages resulting from the project and to assure retention of riparian habitat and preservation of the spawning gravels of the river.

6. Withdrawal of 2,670 acres of Bureau of Land Management land adjacent to the east side of New Melones Reservoir. Land withdrawn under this paragraph would serve to mitigate wildlife habitat losses due to inundation. It is proposed that these lands can be managed as multiple purpose recreation lands including wildlife management under plans developed jointly by the Bureau of Land Management, Bureau of Sport Fisheries and Wildlife, and the California Department of Fish and Game. These lands would be managed by the State Department of Fish and Game.

7. Stringent controls be imposed on construction activities to prevent the destruction of fish and wildlife habitat in and adjacent to Stanislaus River.

8. The existing Melones Dam be breached so as to permit the free flow of subsurface water within New Melones Reservoir. The Department and the Bureau of Sport Fisheries and Wildlife should be consulted on this matter prior to breaching the dam.

9. A zoning plan should be established for the new reservoir to insure that specified areas of the reservoir will be available for fishing and hunting, and other fish and wildlife purposes without conflicting with other proposed recreational uses. The Department will be happy to cooperate with other interested agencies in the development of such a plan for recommendation to the appropriate regulatory agencies.

10. Such reasonable modifications be made in the project operation and facilities as may be agreed upon by the Corps of Engineers, the U.S. Fish and Wildlife Service, and the Department of Fish and Game for the conser-

vation and development of fish and wildlife resources.

11. Federal land and project waters, except such portions as may be reserved for public safety, protection of property and efficient operation, be open to the public without fee for the purposes of hunting and fishing.

12. Leases of Federal land in the project area reserve the right of public access without fee for the purposes of hunting and fishing.

13. In accordance with the recently announced Federal policy regarding land acquisition at Federal project for future development in the public interest; and to provide incidental and additional mitigation acquire an additional 4,560 acres of private land located on the eastern side of New Melones Reservoir. These lands would be managed for wildlife in accordance with a plan developed jointly by the Bureau of Sport Fisheries and Wildlife, Bureau of Land Management and the Department of Fish and Game.

14. Opportunity be provided to select and manage for fish and wildlife purposes other isolated parcels of land and lands contiguous to the reservoir acquired for project purposes.

15. Project funds in the amount of $25,000 be provided for development of lands under paragraphs 6, 13, and 14 for wildlife mitigation purposes.

In making these recommendations the Department has taken cognizance of the President's recent declaration and the most recent policies of the Departments of Interior and Army regarding Reservoir Project Lands. These policies are set forth by Secretary of the Interior in the Departmental Manual, Part 751 "Reservoir Projects Lands."

Specific reference is made to Section 751.1.1 of Chapter 1, Policies, and Section 751.1.4 Land

Acquisition. Among other things this policy states, "The fee title will be acquired to the following": "Such lands as are needed to meet present and future requirements for fish and wildlife as determined pursuant to the Fish and Wildlife Coordination Act."

The joint policy statement of the Departments of Interior and Army is identical in wording to the above. These policies were approved by the Secretaries of Interior and Army on February 16, 1962. * * *

Inclusion of all of the above recommendations will adequately protect and appreciably enhance fish and wildlife and recreation in the project area.

We appreciate the opportunity to review this report. The New Melones project affords an excellent opportunity for water development with protection and improvement of the State's fish and wildlife resources.

COMMENTS OF DIVISION OF HIGHWAYS

Mr. J. C. Womack, State Highway Engineer, by interdepartmental communication dated February 19, 1962, stated that he previously commented on the draft of the New Melones Review Report and that the comments made then are still valid. Additional comments were submitted as follows.

> The New Melones "* * * Review Report indicates on Plates I and III a proposed relocation for legislative State Highway Route 65. The Division does not necessarily concur in the location indicated and advises alternate routes must be given study before a recommendation can be made to the California Highway Commission regarding adoption of a route to supersede the portion of highway inundated. From one to two years will be required for the reconnaissance and public hearing phases of this

study in the two counties concerned before the design stage can be initiated."

COMMENTS OF DEPARTMENT OF CONSERVATION

Mr. W. D. Winters, Deputy State Forester, by interdepartmental communication dated March 6, 1962, submitted the following comments.

> It should be noted that the stream bed in the North Fork of the Stanislaus River and its principal tributaries, Rattlesnake Creek, Beaver Creek, Griswald Creek and Skull Creek, contain large deposits of debris, within the creek beds and adjacent slopes, that can be carried down stream during peaks of high water. There is a large program of work to be done in stream clearance that should be carried on prior to, or during, construction of the project, to eliminate some of the potential hazards to the catch basin of the reservoir.
>
> * * * * *

There are no Division of Forestry structures, power or telephone lines involved in the proposed reservoir below the contemplated high water level and no new stations or other facilities are contemplated at the present time or within the foreseeable future, in either ranger unit. This situation can change, however, depending upon recreational developments that may be installed and the use that such facilities may receive.

The Division of Forestry maintains the following roads and fire breaks within the area, for fire protection purposes. These facilities are all above contemplated high water level, except as noted under fire breaks:

Roads—Fowler Peak 4.5 mi.; Ponderosa Way 7.2 mi.; Raggio Mill 3.0 mi.; Hunter Pt. 4.0 mi.; Dorrington—Sour Grass 25.0 mi; McCormick Meadows 12 mi; Sour Grass 6.0 mi; Griswald Creek 9.5 mi; Lower Beaver 4.5 mi; Ramsey 4.0 mi; McCormick Lookout 2.0 mi; Burnt Corral 8.0 mi. Total road miles 89.7.

Firebreaks—Darby Knob 4.5 mi; Skunk Gulch 3.00 mi; Mariana Gulch 2.00 mi; Otter Bar 0.5 mi. Total Firebreak miles 10.

The lower portions of the last three firebreaks will be below the contemplated high-water level. However, this will in no way affect their usefulness for the purpose they were intended for. Shortened mileage will be the only effect.

No comment can be made, at this time, on other public and private roads, pending study of final plans and maps of the reservoir itself and proposed relocation of existing roads.

CONCLUSIONS

As a result of review of the New Melones Report by the various state agencies concerned, it is concluded that:

1. Optimum multipurpose development of the New Melones Reservoir site should be made for the purposes of flood control, water conservation, hydroelectric power, recreation, and fish and wildlife. Reservoir storage capacity of 2,400,000 acre-feet as planned in the report, is adequate for these purposes.

2. To be in conformance with objectives of The California Water Plan the New Melones Project should be subject to the rights of the upstream areas dependent upon waters of the Stanislaus River to use water required for the future development of such areas.

3. On the assumption that the Hogan Service Area will be served by an exchange of water from the Folsom South Canal and from New Hogan Reservoir, estimates of future upstream depletions as presented in the New Melones Report are reasonable.

4. The design of the dam and appurtenances are adequate and estimated project costs are reasonable.

5. The flood control aspects of the project are urgently needed.

6. The New Melones Project appears to be economically justified.

7. If adequate provisions are made for land acquisition and releases of water for stream flow maintenance, the New Melones Project will protect and enhance fish, wildlife, and recreation.

8. It has not fully been demonstrated that the channel downstream from Goodwin Diversion Dam is adequate to contain a flow of 8,000 cubic feet per second.

9. The New Melones Project does not adequately provide for the water needs of Calaveras and Tuolumne Counties and the Bachelor Service Area.

RECOMMENDATIONS

It is recommended that the proposed New Melones Project on the Stanislaus River be authorized by the Congress at an early date for construction and operation by the federal government; provided that:

1. Recognition be given to the right of the upstream areas dependent upon waters of the Stanislaus River to develop and utilize water required for the future development of such areas.

2. Water be released downstream for fisheries purposes and land be acquired for recreation and wildlife as previously recommended herein.

3. Studies be authorized to develop the full potential of the North Fork of Stanislaus River, including formulation of additional features of the New Melones Project designed to serve 30,000 acre-feet of water each year initially increasing to 50,000 acre-feet by the year 2015, for use in Upper Calaveras County. Further, that the Sonora-Keystone Investigation of the Bureau of Reclamation be programmed to formulate features of the New Melones Project to provide 30,000 acre-feet each year to the Sonora-Keystone area.

4. The Bachelor Service Area be served water from the New Melones Project or by an exchange from the Folsom South Canal.

Submitted by,

/s/ CARL A. WERNER,
Carl A. Werner,
Chief, Delta Branch.

Approved:

/s/ ALFRED R. GOLZE,
Alfred R. Golze,
Chief Engineer.

APPENDIX B

Section 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. 383, provides:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Sections 1(a) and 1(c) of the Flood Control Act of 1944, 58 Stat. 888, 33 U.S.C. 701–1 (a) and (c) provide:

> (a) Plans, proposals, or reports of the Chief of Engineers, War Department, for any works of improvement for navigation or flood control not heretofore or herein authorized, shall be submitted to the Congress only upon compliance with the provisions of this paragraph (a). In-

vestigations which form the basis of any such plans, proposals, or reports shall be conducted in such a manner as to give to the affected State or States, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and, to extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. If such investigations in whole or part are concerned with the use or control of waters arising west of the ninety-seventh meridian, the Chief of Engineers shall give to the Secretary of the Interior, during the course of the investigations, information developed by the investigations, and also opportunity for consultation regarding plans and proposals, and to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. The relations of the Chief of Engineers with any State under this paragraph (a) shall be with the Governor of the State or such official or agency of the State as the Governor may designate. The term "affected State or States" shall include those in which the works or any part thereof are proposed to be located; those which in whole or part are both within the drainage basin involved and situated in a State lying wholly or in part west of the ninety-eighth meridian; and such of those which are east of the ninety-eighth meridian as, in the judgment of the Chief of Engineers, will be substantially affected. Such plans, proposals, or reports and related investigations shall be made to the end, among other things, of facilitating the coordination of plans for the construction and operation

of the proposed works with other plans involving the waters which would be used or controlled by such proposed works. Each report submitting any such plans or proposals to the Congress shall set out therein, among other things, the relationship between the plans for construction and operation of the proposed works and the plans, if any, submitted by the affected States and by the Secretary of the Interior. The Chief of Engineers shall transmit a copy of his proposed report to each affected State, and, in case the plans or proposals covered by the report are concerned with the use or control of waters which rise in whole or in part west of the ninety-seventh meridian, to the Secretary of the Interior. Within ninety days from the date of receipt of said proposed report, the written views and recommendations of each affected State and of the Secretary of the Interior may be submitted to the Chief of Engineers. The Secretary of War shall transmit to the Congress, with such comments and recommendations as he deems appropriate, the proposed report together with the submitted views and recommendations of affected States and of the Secretary of the Interior. The Secretary of War may prepare and make said transmittal any time following said ninety-day period. The letter of transmittal and its attachments shall be printed as a House or Senate document.

* * * * *

(c) The Secretary of the Interior, in making investigations of and reports on works for irrigation and purposes incidental thereto shall,

in relation to an affected State or States (as defined in paragraph (a) of this section), and to the Secretary of War, be subject to the same provisions regarding investigations, plans, proposals, and reports as prescribed in paragraph (a) of this section for the Chief of Engineers and the Secretary of War. In the event a submission of views and recommendations, made by an affected State or by the Secretary of War pursuant to said provisions, sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress; and subsection 9(a) of the Reclamation Project Act of 1939 (53 Stat. 1187) and subsection 3 (a) of the Act of August 11, 1939 (53 Stat. 1418), as amended, are hereby amended accordingly.

Section 203 of the Flood Control Act of 1962, 76 Stat. 1180, 1191, provides in pertinent part:

SEC. 203. The following works of improvement for the benefit of navigation and the control of destructive floodwaters and other purposes are hereby adopted and authorized to be prosecuted under the direction of the Secretary of the Army and the supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein: *Provided,* That the necessary plans, specifications, and preliminary work may be prosecuted on any project authorized in this title with funds from appropriations hereafter made for flood control so as to be ready for rapid inau-

guration of a construction program: *Provided further,* That the projects authorized herein shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements * * *.

The New Melones project, Stanislaus River, California, authorized by the Flood Control Act approved December 22, 1944 (58 Stat. 887), is hereby modified substantially in accordance with the recommendations of the Chief of Engineers in House Document Numbered 453, Eighty-seventh Congress, at an estimated cost of $113,717,000: *Provided,* That upon completion of construction of the dam and powerplant by the Corps of Engineers, the project shall become an integral part of the Central Valley project and be operated and maintained by the Secretary of the Interior pursuant to the Federal reclamation laws, except that the flood control operation of the project shall be in accordance with the rules and regulations prescribed by the Secretary of the Army: *Provided further,* That the Stanislaus River Channel, from Goodwin Dam to the San Joaquin River, shall be maintained by the Secretary of the Army to a capacity of at least eight thousand cubic feet per second subject to the condition that responsible local interests agree to maintain private levees and to prevent encroachment on the existing channel and floodway between the levees: *Provided further,* That before initiating any diversions of water from the Stanislaus River Basin in connection with the operation of the Central Valley project, the

Secretary of the Interior shall determine the quantity of water required to satisfy all existing and anticipated future needs within that basin and the diversions shall at all times be subordinate to the quantities so determined: *Provided further,* That the Secretary of the Army adopt appropriate measures to insure the preservation and propagation of fish and wildlife in the New Melones project and shall allocate to the preservation and propagation of fish and wildlife, as provided in the Act of August 14, 1946 (60 Stat. 1080), an appropriate share of the cost of constructing the Stanislaus River diversion and of operating and maintaining the same: *Provided further,* That the Secretary of the Army, in connection with the New Melones project, construct basic public recreation facilities, acquire land necessary for that purpose, the cost of constructing such facilities and acquiring such lands to be nonreimbursable and nonreturnable: *Provided further,* That contracts for the sale and delivery of the additional electric energy available from the Central Valley project power system as a result of the construction of the plants herein authorized and their integration with that system shall be made in accordance with preferences expressed in the Federal reclamation laws except that a first preference, to the extent as needed and as fixed by the Secretary of the Interior, but not to exceed 25 per centum of such additional energy, shall be given, under reclamation law, to preference customers in Tuolumne and Calaveras Counties, California, for use in that county,

who are ready, able, and willing, within twelve months after notice of availability by the Secretary of the Interior, to enter into contracts for the energy and that Tuolumne and Calaveras County preference customers may exercise their option in the same date in each successive fifth year providing written notice of their intention to use the energy is given to the Secretary not less than eighteen months prior to said dates: *And provided further,* That the Secretary of the Army give consideration during the preconstruction planning for the New Melones project to the advisability of including storage for the regulation of streamflow for the purpose of downstream water quality control.

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